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A C K N O W L E D G E M E N T S

The writer acknowledges the services rendered by Mrs. Carole Kennedy in typing this research paper. He would also acknowledge with thanks the contribution made by Sharon Anderson who assumed the responsibility for preparing the Table of Contents and the Bibliography and was responsible for checking the citations in the footnotes.

J. D. Payne.

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INTRODUCTION

Attitudes of the Institution of Marriage and the Role of the Family

The research paper reflects the tentative opinions of the writer and will receive wide circulation for the purpose of obtaining comments, conclusions and suggestions from all interested parties or organizations interested in the subject. It is emphasised that the Family Research Project is not committed to the recommendations set out herein and that the paper will be evaluated in the light of all comments received and only then submitted for the scrutiny of the Law Reform Commission of Canada. The writer requests that comments be submitted in the form of a written memorandum or brief and that appropriate references be made to relevant pages in the research paper.

Correspondence and comments should be directed to Mr. Jean Côté, Secretary, The Law Reform Commission of Canada, 130 Albert Street, Ottawa, K1A 0L6.

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PREFACE

FAMILY LAW PROJECT

The Law Reform Commission of Canada has consistently maintained a dialogue with the public, not for the purpose of projecting an acceptable image for the Commission but as a manifestation of the conviction that public participation is an integral feature of effective law reform. The decision of the Law Reform Commission of Canada to undertake a major research project in the field of Family Law is primarily attributable to the public response to a questionnaire which was circulated to ascertain the areas of law which required substantial research with a view to reform. The Director of the Family Law Project would emphasise the need for a continued public response which will assist in the formulation of legislative policy aimed at securing reform of federal laws affecting the family. It is not sufficient for the public to remain silent while professional lawyers assigned to or commissioned by the Family Law Project undertake an exclusive responsibility for researching the law with a view to recommending amendments or substantial reform. The lawyer has no exclusive knowledge of family problems in contemporary society and must tap the general resources and expertise available in the community in order to ensure that changes in the legal regime reflect public opinion and the expertise in the various disciplines which define, and endeavour to resolve marital conflict and familial problems. In order to evoke an effective response

to specific issues, the Law Commission of Canada has authorized the Director of the Family Law Project to give wide distribution to research papers. It is sincerely hoped that public analysis of this and other papers will promote constructive amendment and reform of the law affecting the family in Canada.

DEFINITION OF RESEARCH PROJECT ON FAMILY COURTS

The Family Law Research Project proposes to examine the desirability and feasibility of establishing specially constituted family courts with a comprehensive and integrated jurisdiction over all matrimonial and familial proceedings. This research will complement the substantial research which has been or is being undertaken in this area by several provinces, including Alberta, Newfoundland, Ontario, and Quebec. Three persons have been assigned by the Family Law Project to undertake relevant research on unified family courts. This research paper constitutes a conceptual analysis of unified family courts and has been prepared by the Director of the Family Law Project. Professor Murray Fraser of the Faculty of Law at Dalhousie University is undertaking research to ascertain the philosophy, structure and operation of the present courts in Canada which exercise jurisdiction over matrimonial and familial proceedings. His Honour David M. Steinberg of the Provincial Court (Family Division) for the County of Wentworth has undertaken to secure the opinions of all judges in Canada for the purpose of formulating a Draft Model Family Court Act. It is hoped that such tri-partite analysis of the relevant issues and the public response thereto will afford a substantial basis upon which decisions can be taken with respect to effecting changes or re-organizing the present philosophy, structure and operation of the courts exercising jurisdiction

in matrimonial and familial proceedings.

SCOPE OF INQUIRY

An effective analysis of the concept of unified family courts must necessarily transcend constitutional boundaries. Accordingly this research paper will include detailed examination of areas which fall outside of the legislative competence of the Federal Parliament. In the event that the case for unified family courts is established, effective cooperation between the Federal Parliament and interested provincial legislatures is imperative since no legislative tribunal can fully implement the concept of unified family courts by unilateral action under the present Constitution and the arguments in favour of a redistribution of legislative powers to confer a comprehensive and exclusive jurisdiction upon the Federal Parliament or the provincial legislatures are not unduly persuasive, irrespective of the practical possibility of their implementation.

NATURE OF RESEARCH PAPER

This research paper is contemplated as a vehicle for an exchange of informed opinion respecting the adequacy of the existing courts in providing services to persons encountering marital or familial problems

and the need for improvement of such services. As stated previously, the fundamental question for review relates to the desirability and feasibility of establishing specially constituted family courts with a comprehensive and integrated jurisdiction over all matters involving inter-spousal or inter-familial conflicts.

The paper does not purport to examine the need for revision or reform of substantive laws, which constitute the basis for independent studies which are presently being undertaken; it will be exclusively concerned with the philosophy, structure and operation of the courts responsible for administering substantive laws.

The conclusions, submissions, and recommendations set out herein should be regarded as merely tentative. There is no present intention of providing a detailed blueprint or single prototype for legislative implementation of the concept of unified family courts. The opportunity for experimentation, development and improvement of services must not be stultified by rigid legislative formulae and the structure and operation of specially constituted family courts must be sufficiently flexible to permit adaptation to local conditions.

It must be conceded from the outset that difficulty has been and will be encountered in marshalling relevant facts and accurate statistical and empirical information concerning the operation of the Canadian Courts in Canada insofar as their jurisdiction relates to matrimonial and familial proceedings. The lack of a central repository

for relevant data and the substantial differences existing in the respective Provinces and Territories accentuate the difficulty.

Furthermore, many of the issues arising for consideration in this conceptual analysis have no precedent in a Canadian context and can only be substantiated by experience in other jurisdictions. Whether such experience accurately reflects present or prospective conditions in Canada must be resolved by expert opinions from relevant disciplines, including sociology, social work, psychology, psychiatry and law. Hopefully, some insight into innovative procedures in Canada will be secured as a result of a pilot conciliation project which is presently being undertaken by the Edmonton Family Court with the approval of the Department of National Health and Welfare and the Attorney-General's Department for the Province of Alberta. This paper will not include statistical and empirical data but will attempt to evaluate the concept of unified family courts by examining the philosophy and techniques characterizing the present courts in Canada and foreign jurisdictions.⁽¹⁾

INTRODUCTION

Opinions and attitudes concerning the institution of marriage and the role of the family have undergone radical changes during the twentieth century and particularly in recent years. Such changes are evidenced by the emergence of the commune, the demands for recognition of "homosexual marriages", the evolution of "marriage contracts" to define the rights and obligations of spouses and parents, all of which reflect cultural patterns which have developed relatively recently. Advances in the behavioural and social sciences have led to an increasing awareness of the social and economic cost of marriage and family breakdown and its traumatic impact on family members. The cost of marriage breakdown in terms of juvenile delinquency, crime, and welfare costs have never been accurately ascertained but the causal relationship between marriage breakdown and these social and economic problems is well established.

Although some observers regard marriage as an anachronism and predict the disappearance of the family unit as it now exists, history demonstrates that monogamous marriage and the family unit are fully capable of adapting and re-adjusting to changes in societal conditions and that there is every prospect that it will maintain "the crucial functions of giving the family members a place in society, socializing the children, and stabilizing the relationship between a man and a woman". (2)

SCOPE AND OBJECTIVES OF FAMILY LAW

Before examining proposals for the re-organization of the judicial process in matrimonial and familial proceedings, it appears desirable for the writer to attempt a definition of the scope and objectives of family law. The term "family" is incapable of exact or precise definition. In one context, it may refer to the descendants of a common ancestor, in another, it may refer to the members of a common household. For present purposes the first of these definitions is inappropriate because descent from a common ancestor generally does not directly affect legal relations, although it is of limited significance in relation to the degrees of consanguinity which prohibit inter-marriage and to rights of intestate succession. For the purpose of this research study, the family may be regarded as a social unit typically comprising a husband, wife, and children. Certain aspects of this research paper will encompass other social units such as the childless family, the one-parent family, the so-called "common-law marriage" and the commune. Although monogamous marriage is ordinarily the basis of the family unit, a rigid adherence to this concept would appear unacceptable in the present context. Essentially, however, two basic relationships fall within the ambit of family law, namely, the husband and wife relationship and that of the parent and child. Accordingly, "family law" may be narrowly defined as that branch of the law which purports to regulate the

breakdown are the primary issues in family law which attract the attention of the courts and are incapable of constructive resolution unless the legal and judicial process utilize the experience and expertise available in relevant disciplines, including social work, medicine, psychiatry, psychology and other professions.

The objectives of family law have been defined by Sir Leslie Scarman, Chairman of the Law Commission of England in the following terms:

" There is, accordingly, something approaching unanimity as to the objectives of family law. They are: first and foremost, the preservation of family life; secondly, if and when family life breaks down, that divorce should be available in relief of human suffering, and that, whether divorce follows or not, matrimonial breakdown with its inevitable splintering of the family group--man, woman, children--should be met by proper arrangements for the care and upbringing of the children and the support of the spouse who is not the breadwinner." (3)

The philosophy that family law must seek to promote and preserve family life was endorsed by Mr. Trudeau, the then Minister of Justice, when introducing the Divorce Bill in the House of Commons of Canada in December, 1967. He stated:

" Notwithstanding that hon. members will find that the grounds for divorce are being substantially extended by the bill, they will find that the bill is not simply or merely a divorce bill in the traditional sense. It is also a reconciliation bill, in that it imposes stated duties on both the legal profession and the courts in relation to the matter of reconciliation, and these provisions have been included in the hope that as many as possible of the broken marriages that come before the legal profession and the courts can be saved.

status, rights, and obligations of husband and wife and of parent and child. Without attempting to compile an exhaustive or exclusive list of subject areas which fall within the scope of family law, this branch of the law regulates the formation of marriage, the dissolution of marriage by judicial decree of divorce or annulment, the suspension or assertion of matrimonial rights by decrees of judicial separation or restitution of conjugal rights, the recognition and enforcement of inter-spousal rights and obligations, including support and rights pertaining to matrimonial property and assets, the recognition and enforcement of rights and obligations respecting parent and child, including legitimacy, guardianship, wardship, adoption, custody, access, and support; criminal charges arising out of family disputes such as inter-spousal assaults or neglect to provide necessities for family dependants, juvenile delinquency, and other cases directly involving inter-spousal and inter-familial relations.

The above examples emphasize that matters falling within the ambit of Family Law generally involve a manifestation of serious familial conflict or marriage-breakdown. This is self evident with respect to matrimonial proceedings for divorce, annulment and judicial separation, and criminal proceedings involving inter-spousal and inter-familial matter but it is equally true with respect to proceedings involving parental claims for custody of children and proceedings involving neglected or delinquent children, all of which evidence an absence of effective family controls. The underlying problems of familial conflict and marriage

The government is fully conscious of the important public interest that exists in our society in relation to the maintenance and continuation of marriage and the family unit where this is possible. The salvaging of marriages is at least as important as the burying of dead marriages that cannot be salvaged.

However a bill directed to the subject of divorce is not necessarily the most appropriate or only vehicle that can be employed to strengthen and give substance to the marriage estate. The government recognizes that financial assistance and encouragement may well be necessary to develop adequate counselling and other agencies that are necessary to deal with faltering or broken marriages and it is the intention of the government to keep this most important matter under continuous review." (4)

The extent to which family law has attained or can attain the objective of preserving the stability of marriage and promoting the quality of family life will be examined in detail in later sections of this paper. Whether the present legal and judicial process effectively regulates the rights and obligations of affected parties arising on family breakdown will also be the subject of examination in this and other research papers. There would appear, however, to be some validity to the following opinion expressed by Mr. Justice O'Connell of the Supreme Court of Florida:

" We have always expressed our interest in preservation of the marriage and family, albeit in a negative sense, by allowing divorce only for those derelictions which custom and public opinion hold to mean that a marriage is without hope, or stated another way for actions that indicate that one spouse has erred and ought to be punished for it. Moreover, we have

long recognized our public responsibility, at great expense, for the unfortunate results of divorce by the establishment of juvenile courts and various social welfare programs to aid dependent children and their mothers.

But in practice, except for a few enlightened counties in our country, we refuse to make any real positive effort to do that which we profess [we] wish to do--to preserve marriages and keep families intact--on the ground that divorce is a private affair.

As you well know at present the only persons in our judicial system who are felt to have any responsibility to save and preserve a marriage are one, the lawyer who has been hired expressly to dissolve it, and two, the judge who in most courts has authority only to grant or to refuse to grant the divorce.

I do not mean that lawyers and judges alike do not recognize a latent, gnawing, nagging and almost impossible to exercise duty to attempt to save marriages. But the truth is, and we know it, that lawyers and judges are not well fitted to counsel for reconciliation by helping to solve the non-legal problems which lead to divorce. Even if we were, the almost universally accepted adversary nature of divorce pleadings and procedures and the attorney-client relationship do not permit it to be accomplished. Our divorce laws discourage reconciliation, encourage contentious fault and blame concepts which widen family breaches and tension.

Under these conditions it can never be expected that judge or lawyer can effectively act to preserve any but the exceptional marriage in trouble and it probably would have saved itself.

It is time for us as lawyers and judges to admit publicly and convincingly that under existing procedures we cannot, and the judicial system cannot, do that which is necessary, and that which proof shows can be done, to preserve a significant number of families which are now being decimated by divorce with measurable public and private damage.

This confession of inadequacy ought to be made not to absolve the legal profession of its historic concern for family life and its security, but rather as a necessary first step to securing the laws, the procedures, the personnel and the atmosphere essential to enable the legal profession and the courts to do their part in preventing the unnecessary wreckage of families by divorce.

Such a confession will be neither startling, nor harmful to the legal profession or the courts. It is the only way by which the legal profession itself, the public and our civic and political leaders can be awakened and brought face to face with the hard and disturbing fact that divorce is a public and not a private affair.

It is not unusual that a major problem in public affairs can exist without either public awareness of the problem or concern for its solution. Further, it is a proven fact that until there is widespread interest of the kind that leads to determined decisive action by a significant number of citizens and leaders there is scant chance of solution of the problem." (5)

The failure of the legal and judicial process to preserve the stability of marriage and promote the quality of family life is paralleled by the failure to protect the economic interest of family dependants on marriage breakdown. Thus Sir Leslie Scarman has observed:

"[Family Law] has, however, largely failed to answer the problem of support for the family when the wage-earner disappears. Some would say that the problem is not capable of answer: most men cannot afford two families. Nevertheless, it is a reproach to the law that its casualties are the mothers and children--those least able to look after themselves." (6)

JUDICIAL OR ADMINISTRATIVE PROCESS

Accepting that the resolution of matrimonial and familial problems requires constructive intervention by the state, it is necessary to examine whether an effective role should be assigned to the court or to some form of administrative process.

Arguments in favour of administrative process

The most structured proposal for establishing an administrative process was proposed by Floyd W. Sitton and G.J. Winterfeld who unsuccessfully sought to establish such a process in the State of California in 1966. The following description of the Sitton-Winterfeld plan defines the type of administrative process contemplated and summarizes the arguments in favour of such a process:

"1. Family counseling and the adversary system

Family counseling, in our view, is probably the best means of giving advice and encouragement to troubled marital partners. Family counseling can serve as a source of prevention in the ever-increasing number of family breakups and the mounting social problems that follow, such as delinquency, emotional deprivation, suicide, and countless others. The counseling approach has its basis in psychiatry which rests on the need for the patient to define himself as in need of help. Yet, many couples who seek advice do not find the present system geared to offer alternative, constructive solution to their problems.

Under the present judiciary system, procedural considerations, among other things, do not enable extensive counseling of the husband and wife, who may or may not define themselves in need of it.

Because our judicial system is primarily adversary, the orientation of judges and attorneys, induced by training and habit, rests upon professional principles of advocacy. It is difficult, if not impossible, for them to place the public interest of maintaining intact families (father, mother, and children) as the basic units of our society before the property interests and separate concerns of the divided participants to divorce...

It would appear that family counseling is better suited to the jurisdiction of an administrative agency because it is not compatible with the adversary system prevalent in courts.

An administrative tribunal is an instrument of governmental authority, other than a court or legislature, with power to investigate, adjudicate and make rules in matters affecting the rights of private parties. Administrative tribunals are not adversary in nature, and, theoretically, a board can call upon an overview of several persons from various professions and with different perspectives. By contrast, a judge, no matter how qualified for his position, operates within a narrow frame of reference, and calls upon only that amount of therapeutic assistance at his disposal which he arbitrarily decides is needed. A judge is only one man with the appropriate shortcomings of a limited individual perspective....

Under a system of administrative law, better counseling services could be provided by the state. Proponents of administrative tribunals for family counseling and divorce suggest that these boards are also better suited to: (1) handle the detailed and multiple problems of investigation and accurate determination of facts; (2) advise and aid adjustment of the parties involved; and, (3) supervise and utilize community facilities for family problems and family betterment. Much that is necessary in family counseling is outside the competence of the court; a judge cannot supply all the varied, expert skills required to assist a family involved in the emotional distress of dissolution, even with the assistance of a court-appointed counselor.

If counseling is to be effective, it is necessary that it be given more importance in family law. The property and separate interests of individuals involved must, then, be relegated to secondary position. In order to provide the most conducive atmosphere for counseling success, it is necessary that the counselors be unhampered by considerations of judicial restraint, possible judicial bias and personality impediments. Under administrative procedures, counselors would respond to more detached, objective professional agency directors and to the administrative organization as a whole which would, ideally, allow the counselors more flexibility in their relationships with clients.

2. Planning a Department of Family Relations

... {The] Sitton-Winterfeld Plan provided that all related family law be removed from the courts and placed under control of an administrative department (i.e., Department of Family Relations) functioning on a state level with a board of seven elected members from the professional fields of sociology, psychology, medicine, social welfare, education, law, and economics. It was the intention of the author that (1) no profession have a dominance over the Department, and (2) all the knowledge of these varied professions, presently latent and infrequently applied to family problems in the courtroom, be brought into use for practical betterment of family law.

Some of the advantages of such a board on the state level would be: (1) the bringing together of these varied professions to assemble their collective opinions, and (2) apply their advice to treating the myriad difficulties of family dissolution. The unique idea of maintaining marital health through the combined aid of these professions is a noteworthy vision. Each of these professions can have a vital application to family life. The incorporation of their knowledge into general policies which would be administered throughout a state appears to be a practical and meaningful treatment of family preservation.

The Sitton-Winterfeld Plan Further provided that authority be handed down from the state board to two regional boards, and from those boards to local boards whose placement would be based on the

population needs of a county or combined counties. Each regional and county board would be composed of three members from the same fields as the directors of the state board. At these levels, also, no one profession would be allowed to dominate the board. The plan required that each board member be from a different profession and meet certain educational and experience requirements. The directors on the board were to be elected on a non-partisan basis and, in turn, would appoint, by majority vote, the regional boards. The regional boards then would appoint the directors to the local boards by majority vote.

3. The Organization of Family Centers

One of the most important phases of the plan, of course, would be the operation of the local boards. These boards would operate Family Relations Centers in the local communities. This is the level at which people involved in family discord would bring in their problems. The local board would be staffed with counselors, investigators, accountants, and social workers under the supervision of the directors. Whatever expertise was deemed necessary in any individual case could be readily applied.

The dominant principle guiding the center would be a positive purpose of giving preventive and therapeutic help to the family in need of it. If reconciliation and advisory therapy failed, the Family Center Board would be empowered to terminate the marriage contract. In the manner of other administrative law boards, it would investigate and determine the facts relative to the custody of any children, equitable division of property according to law, and all pertinent matters involved in family entanglement. The rulings and findings of the Board would have the same force and effect as a court of law and as do the rulings and findings of other administrative law facilities, such as social security, labor boards, interstate commerce, customs, and workmen's compensation. If the rulings of the local board were found unsatisfactory by either the husband or wife, such person would have the right to appeal to the appellate courts in the same manner as appeals are now taken from trial court proceedings. However, under administrative law procedures, appeals are infrequent, largely due to equitable findings arrived at by arbitration. The non-adversary atmosphere of administrative law is conducive to amicable settlement.

The operation of these local boards would differ substantially from present divorce courts. For example, under the present system, emphasis is placed chiefly on the property rights and interests of the two parties to divorce. At the first serious consideration of terminating the marriage, the instigating party seeks out the advice of an attorney. Thereafter, the party is represented by a legal advocate, whose primary function is to protect his client's individual interest above the needs of the family as a unit, before consideration of the interest of any children, and before the needs of the other party whether financial, mental or physical. This, of course, is the function of adversary law. The adversary idea has a divisive nature and is suited neither to amicable arbitration nor working out family difficulties. Within the adversary system, the other party is forced to seek the services of the attorney to protect his financial and individual interests which leads the parties to engage in a legal combat, often irrevocable.

There has been much discussion of eliminating the adversary system in divorce courts by discontinuing the practice of attaching guilt to one party and labeling the parties "plaintiff and defendant." It would seem that the adversary system lies ingrained much deeper than such surface actions. If the chief design of the adversary system is to protect individual interests, those interests will always come before the interests of the family as a whole unit. Radical re-education of the legal profession and the judiciary would be required to change the advocate philosophies, which are both traditional and inherent. Thus, it would appear much simpler to start over again and provide a vigorous, fresh, positive slant to the problems involved.

In administering family law through Family Relations Centers, the emphasis would be on strong, positive approaches to problem solution. The instigating party would not require the services of an attorney to approach the Center for aid, as he does in such conciliation or family courts that are now in operation. He would not have to go to the Center with divorce his ultimate, dreary outlook

The Center's role would be to give preventive and therapeutic help. Processing divorce would not be regarded as its chief function. In the initial stages of a case, attention would be directed toward cooperation in solving family problems and not to self-protection of individual interests, as so often is the situation under the present adversary system.

The Sitton-Winterfeld Plan specifies that the Family Relations Center would have the power to compel the non-instigating party to appear as needed. If the services of the Family Center were mandatory before official divorce proceedings, the requirement of appearance by the other party would eliminate a voluntary decision on his part. Because many people feel there is a stigma attached to voluntarily admitting a need for emotional help, mandatory requirements would relieve a person of these fears. Except for the mandatory initial appearance, however, the parties would be under no compulsion to accept the counseling services if he or she did not desire to do so. Counseling stages in the Family Center would be both informal and private and participation in counseling would be voluntary. Formal dissolutions of marriages would be decided in open hearings and the parties would be free to be represented at that stage by counsel for protection of personal interest.

Another facet of the Sitton-Winterfeld Plan is a change in the grounds for divorce. The plan would eliminate all the present hypocritical grounds, such as mental cruelty. It would substitute a finding by the Board that the marriage was no longer workable and that it would be to the best interest of the parties if the marriage was dissolved.

The plan also provided for establishment of programs in cooperation with the Department of Education for the purposes of educating young people in family relations and responsibilities. In this manner, the plan hoped to utilize the knowledge gained through the Department of Family Relations concerning the causes of marital breakdown and marital success and impart it to future families. At present, social scientific studies are limited as to what is necessary in successful marriage and what occurs to cause marital breakdown. Family Relations Centers and the

Department of Family Relations might be valuable sources of information necessary for preventive medicine in this area of human relations.

Divorce, as we know it today, is fostered not only by unhappy couples but also by an adversary legal system which has spawned a number of lawyers who systematically manipulate their clients into a court of law and out of a marriage. If any purpose is served by creating an administrative tribunal to handle family matters outside of a courtroom setting, it is the probable maintenance of many families that might otherwise become unknowing victims of irreversible legal procedures and circumstances. A move away from a rigid formal set of rules and regulations toward substantive considerations of the particular case is the means by which an administrative board could make a significant contribution to family life and social advancement." (7)

A more modest proposal favouring the use of administrative procedures in the treatment and disposition of cases involving juvenile offenders and children in need of "care and protection" was advocated in the Kilbrandon Report submitted to the Secretary of State for Scotland in 1964. It is therein recommended that a lay body, comprising persons qualified to consider children's problems, should assume the exclusive responsibility for determining the appropriate disposition with respect to juvenile offenders and neglected children. The Committee concluded, however, that it would be essential that any disputed issues of fact relating to acts alleged, which if proved would justify intervention and disposition by such juvenile panels, must be entirely outside the jurisdiction of the panels, being reserved for resolution by an appropriate court of law.⁽⁸⁾

Arguments against administrative process

There is no lack of criticism of proposed administrative schemes to resolve matrimonial and familial problems. The writer proposes to cite a selection of critical opinions before formulating his own tentative conclusions. Professor Herma H. Kay, Professor of Law at University of California, Berkeley advocates the creation of a family court with an integrated jurisdiction over all legal problems involving members of the family, presided over by a specialist judge assisted by a professional staff trained in the social and behavioural sciences, and employing its own special resources and those of the community to intervene therapeutically in an attempt to resolve matrimonial and familial problems.⁽⁹⁾ Professor Kay observes:

" A preliminary question, raised by some opponents of the family court, must first be mentioned: Is a court the proper institution for settling family problems? The question arises in part because a basic assumption common to both courts is that their daily work is not limited to the decision of legal questions. Issues of child custody and parental fitness, for example, often present complex questions for the analysis and prediction of human behavior that cannot be resolved by the simple application of a legal formula. Moreover, the neglect and delinquency of children and the disintegration of a family appear to involve a degree of emotional stress not normally encountered in litigation involving real property, corporations, contracts, or even personal injury actions between strangers. Finally, it is assumed that the unique resources of a court, namely the presence of a lawyer-judge, the right to use compulsory process to secure the attendance of parties and witnesses and to enforce judgments, and the tradition of deciding individual cases according to rules of law are inadequate to deal with such non-legal problems.

One may ask why a court should attempt to act in these areas, if it is so ill-suited to the task. The answer is perhaps clearer for the juvenile than

for the family court. The juvenile court has as part of its duty the protection of society from the seriously destructive acts of minors; insofar as incarceration is used for this purpose, the Constitution requires the use of court-administered legal standards such as due process for the protection of the defendant. Similarly, the use of a court to decide divorce cases may be justified in part by the need to decide such primarily legal issues as the identification and division of marital property and the assessment of support as well as the need to enforce judgments concerning these matters. A court is also necessary to protect the parties and their children by orders for temporary custody and support during the divorce proceedings. Again, the supervision and enforcement of custody orders during the minority of children would appear to be a proper judicial function. Finally, courts are subject to well-established techniques of review under standards set by constitutional provisions, legislatures, or higher courts, and such review guards the court's clientele against basic unfairness. In view of these considerations, it appears more appropriate to provide courts with nonlegal techniques and personnel than to supply legal authority to non-judicial agencies even if they are better equipped to deal with the primarily emotional problems of family dissolution."(10)

Professor Kay's submissions in favour of a unified family court rather than an administrative process are re-enforced by the experience of juvenile courts in the United States, which applied therapeutic techniques and informal procedures with a conspicuous absence of legal representation or protection and a substantial relaxation of the rules of evidence and of the standard of proof required to substantiate a charge of juvenile delinquency. In a landmark decision of the United States Supreme Court in Re Gault⁽¹¹⁾, the practice of denying effective legal protection to children charged with delinquency was roundly condemned on the ground that the substitution of an unfettered discretion premised upon the philosophy of treating ~~or~~ rehabilitating rather than punishing children and the concomitant denial of legal protection frequently produced

arbitrary decisions rather than careful, compassionate individualized treatment⁽¹²⁾. The opinions of Professor Kay are echoed in the Report of the Governor's Commission on The Family, wherein it is stated:

"[T]o remove family matters from the Courts and to treat them as matters for administrative determination would debilitate the administration of justice and would diminish the efficacy of the process by inviting successive appeals to the Courts. The enforcement of orders would be made more complicated and less effective, and a procedure already too labyrinthine would needlessly be made more complex and costly by the creation of a new entity at a different level. In domestic relations matters no less than in any others, we believe, society is entitled to the integrity and objectivity of the judicial process--but it is also entitled to a process aimed at providing help for families in trouble and employing the resources of the community to that end." (13)

And in the Report on Standards for Juvenile and Family Courts, the following opinions are expressed:

"At one extreme are those authorities who believe that the court itself should administer most of the child-caring and treatment facilities, such as have been developed by voluntary, and more recently, public agencies. In their view, the court would thus become the primary public child-caring agency in the community.

At the opposite extreme are those who would limit the court's function more drastically. They would not only remove from the court all services ministerial or administrative in nature but also would limit its decision-making power by transferring its powers of disposition to an administrative panel or board as has been done in some European countries.

Under our legal system, there would be serious question as to the constitutionality of such action by a non-judicial body. Such a board would be making

decisions that would deprive parents of the custody of their child or a child of his freedom. An administrative board made up of experts in the social sciences--as the proponents of such a board usually conceived it be--is not necessarily trained to protect the rights of people coming before it. Moreover, an administrative board would be no more likely than a judge to come to decisions that are sound for the child. Like the judge, the board or panel must rely for its decision on the study made by the probation staff, with the help of medical, psychiatric, and community resources. The members of the panel cannot themselves make social studies, nor should they, if they are to act in a judicial capacity.

On the other hand, it is not recommended that a variety of child-caring services be administered by a court. To take on these types of services would tend to distort the image of the court and cause it to be regarded as a social agency rather than a court.

Neither extreme point of view would, therefore, seem to meet the situation. The more generally accepted point of view which places some services in the court and others in a public or private social agency under the direction of an executive trained in the behavioral sciences, is preferred and is in line with the American tradition regarding the separation of powers. What services should be administratively subject to each must depend on the essential nature of their contribution to the total process. The court should have administrative responsibility for the services, particularly probation services, which are necessary to its judicial function. Services which do not fall into this category should be administered by an agency in the executive branch of government or by a voluntary agency." (14)

It might perhaps be concluded that the above citations primarily reflect the views of academicians and legal theorists and accordingly reference should be made to representative opinions of the judiciary. Lindsay G. Arthur, Administrative Judge of the Juvenile and Domestic

Relations Division of the Fourth Judicial District of Minnesota has expressed the following opinion:

" Family Courts must be law courts, not social courts. Family problems requiring public intervention usually involve a dispute of facts, an invasion of privacy, and a restriction of liberty. Of all our institutions, only courts can fairly approach a determination of truth, reasonably limit investigative license, and adequately protect liberty. Nothing can sort the kernel of truth from the chaff of imagination, prejudice, and falsehood better than the confrontation of witnesses under the examination and cross-examination of skilled lawyers before an impartial judge. Human experience has consistently demonstrated the danger of clothing the police and other administrative investigators with the mantle of authority unless limited by the simple expedient of judicially considering only properly secured evidence. To delegate to any individual the unchecked power privately to restrict the liberty of another individual, however fine the motive and objective, is to beg petty tyrannies. Hence, the Family Court must be a court of law, a court of lawyers, and a court of justice". (15)

Corresponding insistence upon the protection of the legal rights of all parties had also been advocated by Judge Paul W. Alexander, a zealous pioneer of the concept of unified family courts, who concluded that Family Courts must discharge the dual role of adjudication and conciliation. He stated:

"The modern family court is different from any other court (except the juvenile, after which it is patterned.) It acknowledges, it proclaims that it has two main functions. The first, of course, is judicial. It may never for an instant lose sight of its duty to find the facts and apply the law, to safeguard all the constitutional and legal guaranties of all the parties; to decide the case. The family court's second main function is

more difficult and quite different, for the cases deal with families, not finances; with children, not chattels; with mothers, not mortgages; with fathers, not fame or fortune; with wives, not wills; with husbands, not houses; with people, not property. So, what happens afterwards (and before, and during) to these families and children is of utmost concern to the family court. Hence we may call the second and more constructive, if more difficult function, the ministerial or therapeutic. That means serving, helping, healing. It puts the emphasis on the constructive rather than the destructive; on the preventive rather than the punitive. It practices preventive law. Confronted with a delinquent child it is aimed to correct rather than condemn; with a disintegrating family, to conserve rather than consign to doom..." (16)

In August 1971, the Law Commission of England invited the opinions of interested persons and organizations respecting the disposition of inter-spousal and inter-familial problems.⁽¹⁷⁾ In response to the invitation, the Institute of Judicial Administration at the University of Birmingham expressed the following conclusions:

"23. The Working Party (para. 3) invites submissions on this question:—

To what family matters, if any, should the process of adjudication be applied?

We think this raises the question whether the courts, or some other arbiters, such as a family council, or a panel of behavioural scientists, ought to have cognisance of at least some family matters. We think that the case for retention of the courts is unanswerable. Ultimately, all the matters within the family court's suggested jurisdiction lead to the need for a decision. We think there is no evidence that there exists bodies better equipped to perform this function than 'courts'.

24. The Working Party asks, (para. 4), what relationship should there be between the family court and the social welfare services (including social security)? We must confess to being attracted to the Working Party's first, bold suggestion that the family court be part of a new social welfare organization providing all family services. But this would seem to necessitate a colossal administrative change. We doubt whether the conceded advantage of 'total over-view' of the family, which this change would seek to advance, justifies such a revolution. There might also be some psychological barrier to a court and a welfare organization in the same building. So we prefer the second suggestion, that the family court should be concerned with the primary role of adjudication and with a clearly defined welfare responsibility. Indeed, we favour the closest liaison between the family court and the appropriate social welfare agencies and government departments. In many cases, the legal and social welfare aspects of a family problem are inextricable. For instance, an unmarried mother on Supplementary Benefit has a duty to take action against the father for an affiliation order. Hitherto, the lack of liaison between the court and the social welfare services in such an instance has resulted in much hardship." (18)

In studies undertaken in Alberta,⁽¹⁹⁾ Newfoundland,⁽²⁰⁾ and Ontario,⁽²¹⁾ it has been asserted that the ideal family court would exercise a comprehensive and integrated jurisdiction over all family problems, being committed to the philosophy of promoting the welfare of the family, and employing or utilizing the services of psychiatrists, psychologists, case workers, marriage counsellors, probation officers, and lawyers to assist in the constructive resolution of matrimonial and familial conflict. The alternative of establishing administrative tribunals or procedures has not been effectively canvassed or examined but is tacitly disapproved in these provincial studies.

Professor Hugh Silverman of the Faculty of Law at the University of Windsor appears to favour a process which approximates to an administrative disposition of matrimonial and familial problems. He recommends that the adversary system should be abolished and that the institution of matrimonial proceedings and the hearing before a tribunal should be completely informal. He envisages that "the tribunal could be made up of a judge (retired preferably), lawyer, doctor, social worker, and businessman, but its composition could be varied or altered as the situation or experience dictates". He concludes that the tribunal could investigate and study each individual situation by using the services of a diversified staff and that such staff would render the role of the lawyer superfluous by assuming the responsibility for effective screening and counselling and by placing all pertinent facts and information before the tribunal⁽²²⁾. The proposals of Professor Silverman would appear to reflect several, but not all, of the features of the Sitton-Winterfeld scheme and may evoke the same criticisms as have been directed against that scheme.

Tentative Conclusions

It is submitted that the judicial process should be preserved in the disposition of matrimonial and familial problems in order to guarantee effective legal protection of the rights of all parties. The resolution of conflicting claims where attempts at reconciliation or amicable settlement have failed requires an adjudicatory process which ought not to be transferred to administrative tribunals. The

disposition of matrimonial and familial issues is an integral part of the administration of justice and the judicial process should not be emasculated although it may be necessary to reduce the impact of present adversary procedures and to establish more effective supporting services designed to exclude the necessity of recourse to the court for adjudication of conflicting or competing claims.

CRITICISM OF PRESENT LEGAL AND JUDICIAL PROCESS

FRAGMENTATION OF JURISDICTION

The proliferation of courts exercising jurisdiction in matrimonial and familial proceedings is not confined to Canada but extends to several other countries, including England, Australia, New Zealand, and the United States. The criticisms that have been directed towards such splintered jurisdiction are accordingly international. The writer proposes to cite a representative selection of criticisms before formulating his own opinions. A virtually unanimous condemnation of fragmentation of jurisdiction is found in the extensive literature examining the concept of a unified family court in the United States. Thus Dean Roscoe Pound has stated:

"To maintain an elaborate system of independent tribunals and agencies, each with limited jurisdiction, endeavoring to adjust the relations and order the conduct of the several parties to a suit for a divorce, or controversy involving... guardianship or custody of the children, or crimes affecting each other or their children in the course of carrying on the relation, such as contributing to the delinquency of the children and juvenile delinquency, in the course of operation of a single household--to do these things is wasteful of public funds and of private means, wasteful of the time and activity of both the parties and the particular judicial or administrative or private social agencies to which resort must be had. ...

A system of courts devised to deal with the typical single issue required by the system of formulating an issue in pleadings, reducing the controversy by a series of successive formal statements to a fact asserted by the one and denied by the other, is not adequate to the troubles of a family in the complex society and manifold, diversified, and complicated activities of today. Treating the family situation as a series of single separate controversies may often not do justice to the whole or to the several separate parts. The several parts are likely to be distorted in considering them apart from the whole, and the whole may be left undetermined in a series of adjudications of the parts. ...

It has been pointed out more than once of late that a juvenile court passing on delinquent children; a court of divorce jurisdiction entertaining a suit for divorce, alimony, and custody of children; a court of common-law jurisdiction entertaining an action for necessities furnished to an abandoned wife by a grocer; and a criminal court or domestic relations court in prosecution for desertion of a wife and child--that all of these courts might be dealing piecemeal at the same time with the difficulties of the same family. Indeed one might add an action for alienation of the affection of the wife, actions about receipt of a child's earnings, habeas corpus proceedings to try the immediate custody of the child, a proceeding in a juvenile court for contributing to the delinquency of a child, and another in a juvenile court to determine what to do about certain specific delinquencies of the child. It is time to put an end to the waste of time, energy, money, and the interests of litigants in a system, or rather lack of system, in which as many as eight separate and unrelated proceedings may be trying unsystematically and frequently at cross purposes to adjust the relations and order the conduct of a family which has ceased to function as such and is bringing up or threatens to bring up delinquent instead of upright children." (23)

The defects inherent in a fragmentation of jurisdiction are summarized by Dean Pound as follows:

" Today we have come to see the defects of the system of multiplied specialized courts:

1. It involves conflicts and overlappings of jurisdiction and consequent waste of judicial power on jurisdictional points at the expense of the merits of cases.

2. It involves waste of litigants' time and money in throwing meritorious cases out of court to be litigated over again in other tribunals.

3. It involves successive appeals, such as those on jurisdictional questions followed by appeals on the merits.

4. It requires determination of controversies in fragments in which the merits of the whole situation may be lost or the efficacy of the legally appointed remedies may be impaired.

5. It involves waste of public money in maintaining separate courts of limited powers, whereas a unified administration not only would deal more adequately with each aspect but would assure effective dispatch of the whole at less expense both to litigants and to the parties." (24)

An additional, and no less significant, defect of the present fragmentation of jurisdiction is identified by Andrew S. Watson, M.D., Professor of Psychiatry at the University of Michigan, who observes:

" A single family in trouble may be involved with the juvenile court or juvenile bureau, a probate court, and a circuit court. This means that there will be three judges with three staffs involved in the handling of such a family, and it is unlikely that their efforts will be coordinated or even understood by each other. Since these families are already suffering from marked fragmentation of their interpersonal operations, this kind of judicial handling increases and further distorts the already tenuous integrative process. Past judicial experience and present behavioral research both support the conclusion that such a fragmentating process can only produce chaos. Under these circumstances it is a moot point whether society improves or disrupts family functioning through judicial intervention." (25)

The opinions of Dean Pound have been frequently cited and endorsed. (26) They would also appear to have been substantiated in a comprehensive research study financed at a cost of \$10,000.00 by the Oregon Council on Crime and Delinquency and undertaken by the National Council on Crime and Delinquency, which concluded that the Oregon court structure and practice cause a piecemeal and fragmented approach to family-related problems:

" The NCCD found that this fragmented approach to family-related problems made it difficult if not impossible for Oregon's courts to take informed and effective action. Most of these courts can do little more than deal with isolated incidents involving only one family member. They cannot be advised of or do anything about underlying basic problems in the family--problems which may be causing the delinquency in the child, the assault by one spouse upon the other, the mental illness of a parent, the tottering marriage, or other family-related disorders triggering court involvement.

Placing in one court all jurisdiction and judicial authority over children and their families and providing adequate court staff to help with fact finding, counseling and follow-up are needed to make 'judicial intervention' a constructive and meaningful action by the state.

Our present hodge-podge system of courts developed gradually in response to particular problems requiring judicial attention, but without any recognizable pattern or plan. The result is a system based largely on the expediencies of a horse-and-buggy era." (27)

The National Council on Crime and Delinquency further concluded that the most effective resolution of the attendant defects involved a concentration of jurisdiction over all family-related problems in a single superior court:

" Concentration of jurisdiction in one court, NCCD believes, would bring about a much more coordinated focus on the family unit in juvenile delinquency, divorce, mental illness, offenses between family members, and other family-related matters.

Further advantages of consolidating jurisdiction over family-related cases in one court are:

(1) Reduction of confusion and misapprehension over where to go and what to do with these cases.

(2) Enhanced image of the court in the community, with increased respect for the law and support for the court therefrom.

(3) Establishment of one repository for information and data on each family.

(4) Responsibility fixed in one court." (28)

Criticisms directed against the fragmentation of jurisdiction in the United States are mirrored in England. The following opinions have been presented by the Institute of Judicial Administration at the University of Birmingham:

" It is not hard to find dissatisfaction with the current English system. Its most obvious faults is the remarkable conglomeration of courts dealing with family matters. There is a bewildering number of courts and tribunals which deal with various aspects of family law.

... Examples of problems where there is a multiplicity of tribunals are manifold. But an even more serious criticism might be levelled at the present system. There are, in fact, occasions when the same family issue is justiciable by two--sometimes more--courts. Custody is a well-known case. ...[Experienced] practitioners who know the personnel of their local courts, are able to choose the right (that is, most sympathetic) court for their client. It may well be that the welfare and advisory services of the respective courts are not the same calibre.

But there are more serious consequences in some areas. For if several courts have cognizance of the same subject-matter, when the family is split, it may happen that two courts are simultaneously exercising jurisdiction over the same child. ...Of course, when the existence of concurrent proceedings becomes known, the courts will seek to consolidate them. This has happened in most of the reported decisions, and the courts have sought to establish a hierarchy in the event of conflict. But what of the cases where such conflict does not come to light until orders have been made? We have no evidence of the frequency of such an occurrence. But the possibility itself is a distressing prospect. Not merely does it bring the law into derision, it also sets up a situation classically designed to produce lasting damage to the children involved.

But this is not all. There are some instances in which it seems that the law and practice of each

available court may vary in crucial particulars. This used to be the case with regard to blood tests on a child, where, until the passage of section 26 of the Family Law Reform Act [England] 1969, it appeared that the Chancery Division of the High Court had powers to order a test not possessed by other courts. Another significant example is the confidentiality of welfare reports on children. In Official Solicitor v K., [1965] A.C. 201, the House of Lords held that such reports were confidential. But it is very arguable (see Fowler v Fowler [1963] P. 311) that this decision applies only to proceedings in the Chancery Division, which court inherited the role of the Lord Chancellor as *parens patriae* and has a supervisory, inquisitorial role not possessed by other courts. Thus, the power to solicit confidential reports may not be available to the Family Division [of the High Court]. In any case, this power almost certainly is not available to courts inferior to the High Court, such as the County Court, trying a custody dispute ancillary to a divorce petition.

It seems incontrovertible that this multiplicity of courts, each with differently qualified arbiters, different welfare personnel, different practices and, in some instances, different laws, is both cumbersome and anomalous." (29)

The majority, and perhaps all, of the above criticisms and submissions appear to be equally tenable in a Canadian context. In a recent study undertaken in the Province of Alberta, the following opinions are presented:

"A more important and obvious problem arising from the present court structures is the overlapping and competing jurisdiction of the five courts which administer Family Law. ...Such competing jurisdiction of the courts encourages forum-shopping. ...There are many matters over which more than one court may have concurrent jurisdiction or with which more than one court may deal consecutively.

A very serious problem and defect is the fragmented jurisdiction of the courts. Under the present system there are many cases in which no one court can do all that is needed and the litigants must move from court to court to obtain complete relief.

... Different courts in piecemeal proceedings may be trying unsystematically and often at cross-purposes to adjust the relationship and... order the conduct of a family the functioning of which has been disturbed or which has broken down.

Another very serious problem and defect of the present court system is the conflict in philosophy and approach to the same problems among the courts. The Family Court on the one hand and the Supreme Court on the other are not similar in background. The basic philosophy of the Supreme Court is that of the adversary system, under which it is the entire responsibility of the parties to place justiciable points before dispassionate and non-specialized judges who do not have social services at hand as a matter of course. The Family and Juvenile Courts are set up with the intention that, while they continue to be courts and try issues, there is a somewhat less formal process and somewhat greater emphasis on the investigatory and conciliatory processes. The Family Court judges have a specialized but limited jurisdiction with social and legal services attached to the court.

The end result of these problems and defects is inefficiency and ineffective treatment. It is a waste of time, energy and money to the litigants, lawyers and the courts to move from one court to another and it may be at the expense of the merits of the cases. The existing social services attached to the Juvenile and Family Courts are not readily available to the superior courts, which often deal with the same issues, or to the parties who appear before the courts with the same problems. The difference in availability and use of such services cannot be justified on rational legal or social grounds. An atmosphere of uncertainty and suspicion of the court system arises when similar issues are treated differently. In short, the courts are handicapped by the inadequacies of the system. We believe that a reform of the system is necessary...[and]

that the whole area of Family Law should be brought under the jurisdiction of one court." (30)

Similar opinions are expressed in a research project undertaken in the Province of Newfoundland:

"... [Jurisdiction] in family law in Newfoundland is split among Family, Magistrate, District and Supreme Courts. The jurisdiction over family matters and children in trouble is so fragmented that people are shunted from court to court with their problems. Also, different aspects of one family problem may be adjudicated in different courts. For example, there could be support proceedings in the Family Court and divorce proceedings in the Supreme Court--two aspects of the same problem involving two different courts. As a result it is impossible for the most well-meaning judge to make decisions based on the welfare of the whole family.

Another consideration is that it would be more economical for the family--in terms of timely effort and legal costs--to have legal difficulties handled in a single court. This proposition is so obvious as not to need labouring. The only thing that is not obvious, is that, especially in large communities, it is common for a single family to have a number of problems at one time and to have them handled contemporaneously in a number of different courts. A single court for family problems would therefore avoid unnecessary multiplicity of litigation. ...

There is another point which should be considered, and that is the fact that family problems, by their very nature, require a different mode of handling from other types of litigation--and for this reason a special family law court with appropriately trained staff has considerable merit." (31)

Corresponding criticisms of the fragmentation of jurisdiction in the Province of Ontario appear in the following observations of Chief Judge H.T.G. Andrews:

"It is an unfortunate fact that the whole of the law relating to the family is administered in pieces by four distinct branches in the judicial hierarchy:

The Provincial Court (Family Division)

The County and District Courts

The Surrogate Court

The Supreme Court

Hence, the following anomalous situations occur: the Family Court can take a child permanently from his natural parents and make him a ward of the crown yet has no jurisdiction to take a child from one parent and order custody in favour of another. (32) This right is in the Surrogate Court under the Infants Act (or the Supreme Court which has over-all jurisdiction).

An Order for the adoption of a child is made only by the County or District Court.

The Family Court may adjudge a man to be the father of a child born out of wedlock--a finding of major social significance to that man and that child--and may order the payment of tens of thousands of dollars for the care and upbringing of that child. Yet the Court has no jurisdiction to determine property rights as between husband and wife or to dissolve their marriage.

Expense, multiplicity of actions and perplexity are manifest when a wife proceeds in the Family Court for maintenance for herself and children, the husband claims in Surrogate Court for custody. The Supreme Court processes a hearing over a division of their modest estate. Ultimately an action for divorce may ensue in the Supreme Court: Four separate actions in different courts to determine the rights of the parties. (33) The final disheartening fact is that this whole unreasonable process may be

carried out under strict adversary principles without once someone requiring the parties to explore earnestly the possibility of reconciliation or of settlement of some or all of the issues between them." (34)

In an attempt to resolve the defects inherent in the fragmentation of jurisdiction, Chief Judge Andrews recommends that jurisdiction over matrimonial and familial proceedings should be consolidated and vested in the Provincial Court (Family Division) in the Province of Ontario. He further recommends that a study should be undertaken with the objective of establishing a mandatory pre-trial conference with officers of the court in an attempt to define the issues and, where possible, resolve them by negotiation.⁽³⁵⁾

Criticisms of the present fragmentation of jurisdiction and proposals for vesting a comprehensive and integrated jurisdiction in a single court are not confined to the legal profession and would appear to receive wide public endorsement. The views of the public may well be accurately reflected in the following conclusion of The Royal Commission on The Status of Women in Canada:

"We believe that all questions touching the family unit should be brought within the jurisdiction of one court, the Family Court. Some provinces have already begun to organize such courts but very few have the auxiliary services required for the functioning of the new system..." (36)

Tentative Conclusions

The multiplicity of courts exercising a fragmented and, to some extent, a competing and overlapping jurisdiction over matrimonial and familial proceedings produces uncertainty, confusion, undue expense and duplication of effort.³⁷ Even in the absence of conflicting

proceedings in separate courts, the facility with which a party or counsel may frequently select the court wherein the issues shall be determined promotes unfortunate consequences by reason of the potential conflict of philosophy and approach in the respective courts which engenders forum shopping.

Although little or no information is presently available concerning the extent to which the same families are dealt with by more than one court or in more than one type of legal proceeding, it appears desirable to eliminate the piecemeal administration of justice in the field of family law. It is submitted that a comprehensive and constructive resolution of inter-spousal and intra-familial conflicts requires a consolidated and integrated jurisdiction over all family law matter to be vested in a single court.

Consolidation of jurisdiction in a single court will not automatically promote total consistency of treatment and disposition of matrimonial and familial matters since the attitudes of individuals in the same court may vary.⁽³⁸⁾ Fundamental differences of philosophy and attitude could presumably be reduced, however, by specific guidelines regulating the qualification of judges and non-judicial personnel, by effective training programs for the judges and their support staff, and by periodic evaluation of procedures and dispositions which could be made possible by centralizing the collection of relevant statistical data.

Moreover, the vesting of a comprehensive jurisdiction in matrimonial and familial proceedings in a single court will not preclude a fragmented approach unless the court withstands pressures for in-

ternal specialization designed to expedite the disposition of family law matters and unless the court is provided with adequate plant and facilities.⁽³⁹⁾ A current example of fragmentation of proceedings within the same court, namely the Supreme Court, is to be found in the Divorce Rules operating in several of the Canadian provinces, which preclude or restrict the joinder of other inter-spousal or inter-familial proceedings with divorce actions. Such rules have been trenchantly criticised in a Report of the Institute of Law Research and Reform for the Province of Alberta, which concluded that non-joinder rules should be restricted to pleadings as distinct from trial. Thus, the Report states:

" It may not...be possible to revise the form of pleadings in divorce causes so as to admit of the incorporation of other matrimonial issues. Indeed, it may not be desirable to do so, in view of the form of the divorce petition. There is not, however, any valid reason why the proceedings launched by statement of claim and the divorce proceedings launched by petition cannot proceed together even if not formally consolidated. Indeed, in most cases, it is clearly desirable that all issues between spouses be determined at one time. In addition, it seems wrong to deny the judge in divorce proceedings the power to determine issues the determination of which may be critical to his own decision as to the proper remedies in the divorce action. The economic and psychological burden of separate proceedings is difficult to justify. If there is a social reason for severing the proceedings the court can in the individual case make that determination.

... It is recommended that our divorce rules should be amended to restrict non-joinder to non-joinder of pleadings in the petition"⁽⁴⁰⁾

Similar opinions apparently underlie the following resolution which was approved by the Canadian Bar Association in September, 1972:

"Whereas at the present time a multiplicity of actions is required in order to resolve all the different aspects of the single marital problem;

RESOLVED: that the Canadian Bar Association recommend to the Minister of Justice for Canada and the Attorneys-General for the Provinces, that the necessary steps be taken to provide for the disposition in a single proceeding of all aspects of separation, divorce, custody, maintenance and the division of real and personal property between the spouses and an accounting between the spouses."

THE PRESENT JURISDICTION OF THE COURTS OVER MATRIMONIAL AND FAMILIAL
PROCEEDINGS

Judicial jurisdiction over matrimonial and familial proceedings is fragmented in all of the Canadian provinces. The extent of fragmentation has been defined in several provincial research studies undertaken on the concept of a unified family court. A typical illustration of the degrees of fragmentation is evidenced in the research study undertaken by the Institute of Law Research and Reform for the Province of Alberta. In that province, there are five courts presently exercising original jurisdiction over family law matters, namely the Supreme Court of Alberta, the District Courts, the Family Court, the Juvenile Court and the Provincial Judge's Court. The dimensions of fragmentation in the Province of Alberta are set out in the following chart: ⁽⁴¹⁾

DIAGRAM I

SHOWING THE PRINCIPAL TYPES OF FAMILY PROBLEMS AND THE VARIOUS COURTS
WITH JURISDICTION TO HANDLE THEM

	Superior Courts		Inferior Courts	
	Supreme Court Trial Division	District Court (including the Surrogate Court)	Family Court	Juvenile Court Provincial Court
Divorce	x			
Nullity of Marriage	x			
Judicial Separation	x			
Restitution of Conjugal Rights	x			
Loss of Consortium	x			
Marital Property	x			
Jactitation of Marriage	x			
Declarations of Status including Declarations of Legitimacy	x			
Alimony or Inter-spousal Maintenance (including corollary relief)	x	x	x	x

Maintenance of Children (including corollary relief)	x	x	x	x	x
Custody, Access (including corollary relief)	x				
Enforcement of Alimony or Maintenance Orders	x				
Reciprocal Enforcement of Alimony or Maintenance Orders	x				
Charges under C.C.C.					
Charges under provincial legislation					
Juvenile Offences					
Committal Powers	x				
Neglected Children Temporary Wardship Permanent Wardship					
Guardianship	x				
Adoption					
Affiliation Proceedings					

A similar fragmentation has been identified in the Province of Newfoundland wherein jurisdiction over matrimonial and familial proceedings is exercised by four courts, namely, the Supreme Court of Newfoundland, the District Court, the Family Court, and the Magistrate's Court.⁽⁴²⁾ Corresponding fragmentation is evident in Ontario⁴³ and every other Canadian province.

The fragmentation of jurisdiction is coupled with fundamental differences in the pleadings, procedure, and perhaps the philosophy adopted in the respective courts. These differences may be most vividly illustrated by comparing proceedings in the Supreme Courts with proceedings in Family Courts. The pleadings and trial of matrimonial and familial proceedings in the Supreme Court are formal, being closely regulated by Rules of Court which supplement substantive law and rules of evidence. They are premised on an adversary system whereby each party pleads and advocates his cause for adjudication by the court. The Supreme Court rarely invokes the assistance of agencies in the community in an attempt to reconcile the parties or to promote conciliation or amicable settlement of contested issues arising incidentally to marriage breakdown. A significant qualification must be admitted, however, when contested custody issues arise in divorce proceedings instituted in the Supreme Court. In such cases, statutory provisions, rules of court, or judicial practices permit or require independent investigations and reports to be submitted to the Supreme

Court for consideration in determining which disposition will most effectively promote the welfare of the child.

In contrast, the pleadings in Family Courts are simple and the hearing is conducted in a less formal environment than is evident in proceedings instituted in the Supreme Court. Many Family Courts have support staff to attempt to conciliate the differences of the parties involved in familial conflict and to assist in the preparation of matters for trial when an amicable settlement of the issues is not feasible. It is by no means uncommon for proceedings in the Family Courts to be conducted without legal representation of the spouses and there is, perhaps consequentially, much less emphasis upon adversary procedures than is apparent in proceedings instituted in the Supreme Court. Furthermore, Family Courts have frequently developed close liaison with agencies in the community that handle matrimonial and familial problems and referrals to such agencies are frequently made in cases where legal disposition does not appear to be the most appropriate remedy.

Bearing in mind these general remarks which purport to distinguish proceedings in Supreme Courts from those in Family Courts, it would now appear appropriate to examine in some detail the criticisms which have been directed against the judicial process insofar as it purports to regulate family law matters.

MATRIMONIAL AND FAMILIAL PROCEEDINGS IN THE SUPREME COURT AND FAMILY COURT

In an attempt to ascertain the most appropriate method of effective treatment and disposition of family law matters, the writer proposes to undertake an examination and evaluation of the philosophies and procedures in the Supreme Court and in the Family Court, which purportedly evince fundamental differences of attitude and approach.

CRITICISMS OF EXISTING PROCEDURES IN THE SUPREME COURT

Much of the criticism of the judicial process in the Supreme Court is specifically directed against divorce proceedings but it is frequently applicable to other matrimonial and familial proceedings instituted in the Supreme Court. The writer proposes to cite a representative selection of criticisms before formulating his own conclusions respecting the philosophy and procedure of the Supreme Court.

The most fundamental criticism of the procedure in the Supreme Court relates to the adversary concept. A commonly asserted opinion is that inter-spousal and inter-familial proceedings reflect social and not merely legal problems and that an adversary approach to the resolution of such problems is contrary to the public interest and detrimental to the parties and their children by reason of its undue emphasis on the symptoms rather than the basic causes of marriage and family breakdown. ⁽⁴⁴⁾ Many critics of the adversary process assert that a preventive or therapeutic approach rather than a recriminatory fault-finding technique is socially desirable and requires a specialized family court to investigate and dispose of matrimonial and familial problems.

The adversary process is a common feature of legal systems which have evolved from the common law of England and criticisms of the process in matrimonial and familial proceedings are reflected in a wide variety of jurisdictions.

It is frequently asserted that the adversary procedure provides insufficient information for the court to ascertain the causes of marital and familial conflict and accordingly precludes the possibility of seeking any solution other than judicial dissolution of the status of marriage and legal severance of family ties. It is also asserted that the adversary process precludes effective judicial dispositions to promote the welfare of the children of divorcing parents. Thus, Elizabeth and Richard Dyson have observed:

"The substantive law...tends to pit couples against one another by focussing on a guilty act or 'fault'; the pleading system of answers and defenses augments the recriminatory flavor of the usual action for divorce.

Courtroom procedures are similarly cast in an adversary mold. ... Opposing lawyers draw out evidence, cross-examine witnesses and attack credibility as in other civil actions. Where there are disputed child custody issues connected with an action, they also may be fought in open court. Though a child's happiness and welfare are supposed to guide the judge in making his custody decision, he usually has no tools for conducting an impartial investigation of the child's home life. A custody decision is ordinarily based on a few legal presumptions, whatever evidence might be extracted by the lawyers, and statements of the child himself. (45)

The procedure for dissolving marriages, like a primitive dance, is essentially a ritual. A lawyer files a petition charging a guilty act. Highly stylized testimony is given in open court to prove the act. Where there is a context, it centers on relative 'fault' of the parties, with the respondent often seeking to show that the petitioner is equally 'guilty'. The traditional divorce procedure has no provision for examining the underlying psychological problems of the marriage, for seeking a solution short of divorce, for counseling on problems attendant on divorce, or in fact for offering any advice at all, beyond what the parties' lawyers may offer on their own." (46)

Similar opinions are expressed by Professor John Bradway:

"The fact-gathering process in litigation is based on direct and cross-examination. This process is rigidly circumscribed by rules of evidence appropriate to a contest but perhaps fatal to a cure. There are several limitations inherent in the nature of the device. If the matter for judicial determination is one which has occurred in the past, the facts relating to it are more likely to be successfully gathered than if the problem has implications in the future. ...So in divorce if all we lawmen are concerned with is what has happened between the spouses in the past, adversary litigation may be adequate. However, often there are problems to be solved which lie at least partly in the future. If the divorce court does not solve them in a professional manner, then they tend to remain to plague those most affected. ...

If the motivation of the parties in interest is really adversary the orthodox litigation process may supply facts on the issues between them. But where, as in divorce, so many matters are non-contested, there is no reason to suppose that the facts will more or less automatically rise to the attention of the court. There is reason to consider in this connection the better type of statutory proceedings attending the adoption of a child, a task requiring individualized action. Here also is a change of status with need for a large variety of facts relevant to the welfare of the child. Yet most of the statutes have predicated the proceeding on a non-controversial routine. Direct and cross-examination may be used but investigation by a team of professionally trained personnel produces much more. It seems to be working reasonably well and to be accepted by the public. An alternative might be adoption by deed of the parents.

In a divorce case the orthodox adversary litigation framework may be adequate to provide the limited quantum of facts necessary for the court to decide the private issues between the spouses. These are basically economic in character, mostly lying in the past, and often limited to a few rather narrow points. But if we conceive of divorce on a larger canvas in terms of the welfare of the ailing family as including public problems, non-economic in character and dealing with the relations between the family and the state, it is reasonable to argue that something more than direct and cross-examination is indicated. It is appropriate for the bar to urge the legislature to take the necessary steps." (47)

And Professor Gellhorn concludes:

"... The failure to provide in the divorce courts any considered procedure for saving marriages that are not hopelessly wrecked, is patently inconsistent with the professed belief in the importance of the family. ...The courts may themselves be able to salvage many marriages." (48)

These opinions are shared by members of the judiciary who exercise jurisdiction over matrimonial and familial proceedings: Thus, Paul W. Alexander, formerly the Judge of the Toledo Family Court and a leading exponent of the concept of a unified family court, has stated:

" When domestic discord strikes at family life few things could be better calculated to intensify antagonism than the cruel and senseless system which requires one spouse to attack the other in pleadings open to the public press, to bring witnesses into court to expose sin and shame, and to air his own unsavory accumulation of dirty linen.

Adversary procedures mean that no spouse may with impunity neglect the slightest grievance or overlook the smallest offense. He must store them up in his memory and harbor them no matter how much they may fester, for if worst comes to worst and his marriage turns out to be that one in four which is destined for the divorce court, he will fare ill unless he can dredge up from his storehouse of iniquities enough raw material to be worked over by a skillful lawyer into grounds for divorce. The minute they quit tearing at each other's throats and sit down to talk things over sensibly so as to settle the conflict peaceably, they risk losing out entirely through the doctrine of collusion.

Of course, forgiveness may be fatal. The Christian principles of confession, repentance, forgiveness have no place in divorce court and their exercise in the interpersonal relationships which constitute the marriage may be fraught with risk. The husband who has strayed off the reservation and repented, and now wants to confess and seek forgiveness gets scant encouragement from the law. He would be furnishing his wife with a devastating weapon against himself simply because the law makes evidence of such guilt a ground for divorce. And on the other side of the picture the wife may be damaging her position by forgiving the husband, thus affording him the defense of condonation to use against her.

The instant either of them looks to the law for relief he must put aside all thought of confession, of making amends, of concession, of forgiveness. He must start out with accusation. Then he must maintain an attitude of antagonism. The stricter the law the more he must pile accusation on accusation.

Each fresh accusation drives the wedge deeper. But that is the only way to meet the law's demands. Guilt! That is what the law wants to hear about, to ferret out and to punish. Sin! That is at once the cornerstone and the keystone of the structure of the conventional divorce court. It has no room for, indeed it penalizes such simple virtues as kindness, sympathy, magnanimity, understanding, mercy, considerateness, unselfishness, honesty. The more the evidence of guilt piles up the more fully is the law satisfied. And honest efforts at marriage mending or amicable adjustment will continue to be frustrated by the law itself as long as the criterion of guilt prevails with its twin syndromes of the accusatory and the adversary procedures.

...And in a relationship where interaction is never-ending, where the dynamics of interpersonal relationships are in play constantly, what chance does the clumsy, adversary, litigious process have of distinguishing cause from effect and of arriving at the subtle truth?

Even if for some obscure reason the practice of making emotionally bedraggled spouses into winner and loser be defensible, experience has shown that it often tends to increase the rivalry and hostility and thus to thwart bona fide efforts to protect the members of the family and preserve the family life." (49)

Similarly, Justice Louis H. Burke has expressed the concern shared by conciliation courts regarding the inadequacies of the adversary process.

He stated:

"If the answer to the Biblical question, 'am I my brother's keeper?' is 'No', then the law's traditional answer to the threatened breakup of marriages, the supplying of an adversary procedure for annulment, separate maintenance or divorce --will continue to be adequate. If, on the other hand, the answer is 'Yes, we are our brother's keeper', then the adversary system, as it applied to domestic relations matters, falls short of the mark; it provides solely the knife to sever the nuptial knot. Furthermore, in every step the adversary system has the effect of deepening marital wounds and rendering the possibility of reconciliation increasingly more difficult. By way of illustration, consider for a moment the impact of the 'legalese' in which the charges of marital misconduct is couched, upon the uninitiated in whose hands such a document is handed. The law's answer to divorce does absolutely nothing to arrest what is truly a national tragedy -- the granting of the unnecessary divorce to a marriage not yet dead; and often to parties who are not even sure that divorce is an answer to their problems. ...[The] adversary system was designed to make it difficult to get a divorce; that is

its admitted objective. And for that reason a legal separation is intended to be committed only if one of the parties has given the other sufficient cause to justify a divorce being granted. If every divorce action was to be fought out at arm's length on the basis of legal grounds comparatively few decrees would be granted. But the intent of the adversary system has been sidetracked as a result of the high percentage of divorces which are uncontested. Ninety percent of divorce actions go by default and, in effect, this amounts to a divorce by consent since they are based upon an alleged wrongdoing supported in court by a minimum of truth." (50)

The criticisms of lawyers and the courts regarding the adversary process are supplemented by those of experienced marriage counsellors. For example, Meyer Elkin, Supervising Conciliation Counsellor in the Conciliation Court of Los Angeles County, observes:

" Divorce laws in the United States have been framed in accordance with the adversary principal. As a result, a divorce complaint reads, 'Jones versus Jones'. This approach to the possible termination of a marriage is in sharp contrast to the approach recommended by behavioural scientists, who look upon divorce as a socio-psychological problem. An enlightened and humane approach would dictate that a divorce action read, 'In the Interest of the Jones Family'. Present-day divorce courts, hampered by archaic and unrealistic laws, tend to aggravate an already disturbed situation instead of providing a protective and healing atmosphere for troubled families coming within their jurisdiction. In effect, a divorce decree is a family death certificate declaring that the marriage is deceased.

Usually the real reasons for a divorce are not made known in the statement of alleged legal reasons; rather they are to be found in the character defects and personal inadequacies of one or both partners. Since a marriage cannot be terminated without recourse to a legal procedure it would appear that the divorce court is in an excellent position to provide marital counseling services for estranged couples. Few such court-connected services are actually in existence, however." (51)

Psychiatric opinion also suggests that the adversary process coupled with legal emphasis on a fault or offence concept aggravates the conflict in the inter-personal relationship of the spouses and may be injurious to the welfare of the children. (52) Thus, Irvin Philips, M.D. has asserted:

"Judges and attorneys must work within the framework of laws which set up two opponents and determine the guilty and innocent, to punish the one and reward the other. The adversary character of the legal proceedings may even intensify the conflict. Yet there are no wholly innocent or wholly guilty parties in a divorce. And the law, though not designed or obliged to aid in reconciliation or reduce emotional conflict, should not exacerbate the conflicts and thus interfere with the family's best interests.

Divorce may well be the best solution of the marital problem, but the way the proceeding is handled from start to finish may deeply affect how each spouse behaves to the other, feels about himself and reacts to the settlement of property or custody of children. All too often the practice of the procedures of the law may so use those elements of the substance of the law to aggravate an already conflicted situation. Readiness to use the adversary concept before exhausting the efforts for

conciliation and agreement all too frequently results to the detriment of each spouse and the children. The repercussions of the failure to achieve satisfying results are reflected in the heavy domestic relations court calendars, with charges of delinquent payments, requests for revisions of settlements, petitions for change of custody, violations of visitation rights and the like. Although revision of the law and its practice may be necessary to resolve some difficulties, the present structure affords workers in this field considerable opportunity to help each spouse achieve results that benefit the family. What has been learned by the behavioral sciences, especially psychiatry in working with families has not been fully applied by the legal profession to families with marital problems." (53)

Professor Andrew Watson endorses these opinions in the following statements:

"Contemporary psychodynamic theory would vigorously challenge the idea that 'fault' is an appropriate and useful concept for understanding marital discord." (54)

and

"Practicing psychiatrists frequently see marriage problems which might possibly have worked out successfully had it not been for the ill-timed and inappropriate **invoking** of some legal procedure. ...Legal intervention should be the last rather than the first kind of professional service offered to unhappy married couples." (55)

Although the above criticisms of the adversary process reflect only opinions from the United States, corresponding criticisms have been expressed in other jurisdictions. Analysing the situation in Australia, John M. Biggs asserts:

" The very fact that an application for divorce comes to the court is an admission of defeat by the parties; they have been unable to make their marriage work. But the court does nothing to help them rectify the situation. 'Divorce offers no remedy. It contains no therapy. It literally divides but division per se offers no cure'. If a divorce is granted, the parties are virtually parted for good; if it is refused, the court has not thereby assisted the parties towards a reconciliation. In fact, it is likely that they will be farther apart than before, because the whole court proceeding emphasizes that they are adversaries instead of two persons who are seeking a solution to common, intimate problems. By the time the parties get into court, 'they are hostile; they are bitter; outrageous charges have been made and counterclaims have been made; and they are in fighting mood'. Analysis shows that the parties must really be dealt with before they reach this intransigent stage; after this, it is usually too late and they will never be reconciled even if they do not get a divorce. Appearance in court should be the last, irrevocable step in a matrimonial relationship, not, as it is today, virtually the first thing to which people turn.

...It was with this revolutionary change of approach in mind that the Family Court was developed in the United States, where there are at least 25 such courts at present. They seek to overcome defects in the existing system of courts in three ways: i. treating the family as a unit and concentrating all matters concerning the family in the jurisdiction of one court; ii. seeking specialist judges with an insight into the particular field; iii. attempting reconciliation procedures before the marriage finally enters the courtroom.

The function of such courts has been envisaged by one of its foremost exponents, Judge Alexander, as follows: The family court so operates that 'it may be constructive, not destructive of marriage; that it may be helpful,

not harmful to the individual partners and their children; that it may be preventive rather than punitive of marriage and family failure'." (56)

And in England, Sir Frederick Pollock has observed:

"For some time I have thought that the cause of discontent with English jurisdiction in matrimonial causes lies deeper than controversies over the grounds for divorce or separation. When our divorce court was created its method and procedure were modelled, rather as a matter of course, on those of our civil courts in matters of ordinary litigation. The business of the court is to do justice on the claims and defences raised by the parties; it has little power of initiation or inquiry, and very little of intervention. At most it can find occasion to make suggestions for a settlement. Such is the frame of our civil procedure and quite a good one for dealing with men's disputes on matters of trade and property and their individual and collective relations as neighbours and fellow-citizens. The application of that scheme to family relations and to marriage in particular is, in my humble opinion, all wrong. A better analogy may be found in the paternal jurisdiction of the old court of Chancery over its wards, exercised to this day by the judges of the Chancery Division, to the general satisfaction of all concerned. A court for matrimonial causes should have conciliation for its first object, should have the carriage of the case in its own hands and should be entrusted with wide discretion. It should have power to grant a final decree of divorce when, after full inquiry and consideration, reconciliation proves impracticable, or to make a decree nisi with a discretionary term of anything from three to twelve months." (57)

The adversary process has also evoked trenchant criticism in Canada. One critic recently stated:

"It is clear from British Columbia divorce practice that present assumptions and commitments regarding the retention of the adversary system — the nominal and restricted use made of sociological reports; the lack of specialization among judges; the requirements for compliance with strict evidentiary rules in open court — are contrary to the fundamental nature of family courts in both Canada and the United States regardless of their scope of jurisdiction. The writer is convinced that justice must 'peek from beneath her blindfold' and fully distinguish the entire spectrum of domestic relations matters from the main body of litigation coming before the courts. Acceptance of the juvenile concept is evidence that society recognizes that children in trouble warrant different treatment from adults. Surely it is becoming equally apparent that disputes between husband and wife are similarly worthy of specialized and separate attention. ...

It is clear that the law and the judicial techniques relating to marital conflict have failed to preserve and stabilize marriage. The Divorce Act of 1968 depends upon the continuation of the existing court structure for its administration, and its passage is a further affirmation that whatever else marriage might be, it is still regarded by the state as a public contract which only it can dissolve.

The corollary to this absolute power over the dissolution of marriage should be active state involvement in widespread and enlightened efforts to promote the stability of marriage and the family. Instead, while Canadian law in this area may be credited with the virtue of consistency, little else may be said for it, as the content and especially the administration of divorce law remains largely '... out of touch with the changing realities of modern society. Most of them tend to embitter spouses, neglect the welfare of children, prevent reconciliation and produce a large measure of hypocrisy, double-dealing and perjury.'

The thesis of this article is that the establishment of a comprehensive family court system is both appropriate and necessary if the state is

is to adequately discharge its responsibilities and protect its interest in the preservation of marriage and family life. Specialized courts alone are clearly not the panacea to marriage failure. At the very least, however, they will enable the law to '...be more certain that those to whom it gives the right to disrupt one family and form another are acting wisely and are not... about to enter a second marriage more brittle than the first'." (58)

The concept of adversary proceedings and the role of the Supreme Court in the adjudication of inter-spousal and inter-familial conflicts was also the subject of frequent criticism in briefs and submissions presented to The Special Joint Committee of The Senate and House of Commons on Divorce. Perhaps, the most outstanding criticism from an academic source was that of Daryl E. McLean who stated:

"In his article, 'The Place of the Family Court in the Judicial System' [(1959) 5 N.P.P. A.J. 161, 168], Dean Pound [states]:

' One difficulty in judicial treatment of family problems is that while marriage is sometimes spoken of as a contract, it is radically distinguishable from contracts which create duties of debtor and creditor in commercial relations. A legal procedure designed to deal with breach of such contracts, having to do with an economic relation capable of being reckoned in money, is not equal to treatment of the more complicated task of unraveling the complicated threads of the marriage bond and adjusting the respective relations so that each party may continue to live a useful life. Marriage creates a status. Dissolution of a status calls for a procedure different from the one that suffices for recovery of damages for breach of a commercial contract or reparation for forcible aggression upon person or property. The former affects both the social and economic order; the latter affects the economic order only.'

Many arguments can be advanced to support Dean Pound's statement. For example,... the adversary procedure is followed due to the substantive law on divorce which is based on the matrimonial offence theory. Under this theory, one spouse is attacking the other for committing a matrimonial offence and, supposedly, the accused spouse will defend the action if this is false. During the hearing of this contentious litigation, all the relevant facts will be brought out by one side or the other and the judge will be able to decide whether to grant a decree on the merits of the case. It is a shame that so many intelligent and educated men have been forced to 'look the other way' by such archaic laws. ...There is no element in an uncontested divorce case to bring out all the relevant facts. The only way to have all the facts before the court in such a case is to employ the inquisitorial procedure. The inquisitorial approach would not discourage reconciliation by creating real hostility where none existed beforehand as does the present procedure. It would encourage a reconciliation by bringing out the real reasons for the marital discord for both spouses to face. However, the inquisitorial procedure could not be employed by superior courts (where the hearing of a divorce often takes about as long as the hearing of a [defended] traffic charge) due to the pressure of time.

In many areas the judges of the divorce courts move about on assizes. As Dean Pound points out, divorce is a specialized matter. To be able to recognize whether there is possibility of a reconciliation, a judge must be experienced in handling matrimonial cases and have an understanding of human nature. Judges on assizes hear every class of action that comes before a superior court so they do not have the opportunity to become specialists. Moreover, they will have a full schedule and are unlikely to adjourn the proceedings for further inquiries or marriage counseling.

It is obvious that superior courts are ill-suited to hearing divorces. Jurisdiction over divorce was transferred to the superior courts 110 years ago. Will we have to wait another 50 years before Parliament realizes that the superior courts are also ill-suited to handle the divorce law? A far more suitable court for hearing divorces, the family court, has been established in many of the states in America..." (59)

Corresponding criticisms of the adversary procedure in the Supreme Court were articulated by P.J.T. O'Hearn, Judge of the County Court, Halifax who concluded that jurisdiction in family law matters should be consolidated and vested in the Family Court. He observed:

" It is usual to defer consideration of definitions to the end of a bill, but the definition of 'family court' is relevant to the complaint that the wrong courts handle divorce cases. The courts named in the definition are, in every instance, the ones named by provincial statutes or territorial ordinances to deal with family matters. In some places they are staffed by justices of the peace who may not be lawyers. This should not be an objection to giving them jurisdiction in matrimonial suits, however, as they are charged under provincial legislation with deciding questions of equal social and legal importance and of equal difficulty. These include, in addition to juvenile offenders, such matters as neglected children, maintenance and wardship. In many instances, where the court is designated as the family court or social welfare court, the court handles all family legal disputes except judicial separation, nullity and divorce. Such a court is constantly deciding questions of the utmost importance concerning the status and welfare of individuals. They use techniques of investigation and conciliation that have proved effective in helping families to achieve stability. They deal with the social problems well and with the incidental legal problems well enough. In each case there is some means of getting any really difficult legal problem before a court of appeal.

In contrast, divorce courts handle cases without any investigatory staff and without social welfare techniques much in the same way as the winding up of a company might proceed. Indeed, many marriages are dealt with in less time and with less care than a contested trial for speeding. The divorce courts usually have the same judicial personnel as the superior courts of the provinces and move about in like manner, on assizes. This means that an individual case gets its day in court as a legal action but none of the care that such a social problem requires. A judge on circuit is rarely disposed to adjourn such a case for further inquiries on conciliation procedures, even if it is legally possible. The tempo and procedure of the superior courts is well enough designed for deciding strictly legal questions but it is quite inappropriate for the settlement of broken marriages or other domestic problems.

A transfer of matrimonial suits to the family courts is the rational solution: to try to adapt the practice of the superior courts to the techniques of the family courts would only create confusion in the superior courts. Since Parliament has jurisdiction over Marriage and Divorce it can impose such jurisdiction on provincial courts." (60)

In supplementary oral testimony, Judge O'Hearn stated:

"Formality in procedure is not a strengthening factor in handling family problems. ... In my opinion the Supreme Court and the assize courts are not properly equipped to handle the problems that arise. The judges have neither the time nor the outlook. Once you get it before a judge who is dealing with contracts you are dealing with another case of legal rights and wrongs. ... I know that the judges do try to put heart and soul into it, but they have not the proper machinery. Even with the best will in the world to help these people, the Supreme Court judge has not the time, the facilities nor the outlook to deal properly with domestic problems. ... Whatever their defects, and I am not blind to them, [the Family Courts] would do a better job than is being done now by the Supreme Court. They have people trained in welfare work who can help to find out what is going on and conduct the reconciliation process." (61)

Trenchant criticism of existing procedures in the Supreme Court is also apparent in the submission of the Honourable J.C. McRuer, former Chief Justice of the Province of Ontario, who recommended that concurrent jurisdiction in divorce proceedings should be vested in the County Court and the Supreme Court.⁽⁶²⁾ The former Chief Justice identified two specific areas which merit criticism. First, he observed that custody dispositions arising incidentally to divorce present insuperable problems for the Supreme Court judge on circuit. Secondly, he asserted that litigants should not be put to the costs of a trial in the Supreme Court where divorce proceedings are uncontested. He stated:

" I have presided at a great many divorce trials, and I may say that it was not a privilege I enjoyed... It was very frustrating, and I want to bring the committee to a sense of the frustration and the importance of a divorce case, I do not care whether it is a non-contested case or a contested one. The most difficult and frustrating ones are the non-contested cases. ...

I always felt awfully helpless in deciding a question of custody as a Supreme Court judge. I was very remote. I would go to Welland, and I would probably not be back in Welland again for five, six, or seven years. It is the same with other judges. We go on circuit, we go in and hear a case and we feel that we are not at the bottom of it at all, but we make an order for custody. We will say the children are young and you feel the mother is the one to have custody; but the father is a decent chap, he is a school teacher and could be a very good influence on the children, have access to them, take them out at the weekends, take them away skating and skiing, that sort of thing, all the things a father can do that a mother cannot do very well, and you make the order. Then before you are out of town they start quarrelling about it. You try to specify hours, which is so difficult; you say the father can have the

children on Saturday from nine o'clock in the morning until half-past six at night -- these kinds of orders that you pull out of the hat, not knowing too much about the exact circumstances of the family; you get it in a casual way. ...

If you leave the act as it is now, you have the sole jurisdiction in the Supreme Court judge, who must hear the case. You have a Supreme Court judge sitting hearing these non-contested cases, you are taking the whole time of one judge, all his sitting time during a year in Toronto. That is one judge alone hearing non-contested cases, where it is pure formality; they come in, prove the services, the witness goes in the witness-box and proves the marriage, then they read from an examination for discovery in which the man says, 'Yes I am living with the other woman. I am living with her and I have got two children by her' and so on, decree nisi and off it goes.

Why should the plaintiff in cases of that sort be put to the costs of a Supreme Court trial, which are very considerable, when it should be, I think, disposed of by the county court judge? If county court judges are not good enough to try those kinds of cases I do not know how they are good enough to try people who may be sentenced to gaol for life, and I think it is just about as simple as that.

I would like to see in the first place a dominion act, in that it would be necessary for the dominion legislation to confer concurrent jurisdiction on the superior court and on the county courts as far as Ontario is concerned." (63)

The adversary procedure is not lacking, however, in adherents or champions. There are many who assert that the substantial proportion of uncontested divorce proceedings, which probably represent more than 90 per cent of all divorce proceedings, signify the efficacy of the adversary procedure which promotes the negotiation of settlements by the lawyers representing the two spouses and the consensual resolution of matters incidental to the divorce, such as the distribution of

matrimonial property and assets, inter-spousal maintenance, and the custody and support of the children of the family. For example, Lindsay G. Arthur, Administrative Judge of the Juvenile and Domestic Relations Division of the Fourth Judicial District Court of Minnesota, has stated,

" The literature is replete with insistence that the adversary system, by definition, amplifies bitterness and hostility and that lawyers, trained as advocates, lack objectivity at finding viable compromise solutions. It may well be true that cross-examination engenders bitterness , but if truth be necessary to the viable solution, the crucible of adversary proceedings will best find that truth. It is also certainly true that lawyers are advocates. This is necessary because most people are unable to relate their own stories completely and comprehensibly when personally and emotionally involved. As the axion goes, even 'a lawyer who defends himself has a fool for a client'. Moreover, lawyers are quite able to find compromise; possible eighty percent of the lawsuits started in our courts are ended by a compromise found by the lawyers. That lawyers lack objectivity in adversary proceedings is also true; they are appearing as advocates, not as arbitrators. It is the judge who is objective, and in a Family Court with a trained judge, this objectivity will encompass both the legal and social aspects. It has been said that 'lawyers provide great therapy for the messianic complex of judges'. A judge of a Family Court would often need such therapy." (64)

Similarly, the fault or offence concept, an inevitable concomitant of the adversary procedure, has its defenders, even amongst those who advocate a unified family court with specialized facilities and procedures for reconciliation of the spouses and, where this is not possible, for conciliation or amicable settlement of issues arising incidentally to divorce. Thus William E. MacFaden⁽⁶⁵⁾ and Meyer Elkin⁽⁶⁶⁾ have stated:

"The authors of this article believe that in the main the argument as to the damage done by the current fault provisions of complaints required under existing law is vastly overemphasized. In California, more than 90 per cent of the actions involving dissolution of marriage are ultimately disposed of by default and are not heard or tried as adversary proceedings. However, we have no objection to the elimination of the fault grounds and the substitution of a petition for the present complaint. Even in today's adversary proceedings, it is a very rare case where a contested divorce proceeding actually involves much testimony in connection with the grounds of divorce by either or both parties. Normally, by the time a contested action reaches trial there is little doubt but what the marriage is irreparable and should, therefore, be dissolved; consequently, little time is wasted in testimony disclosing the grounds. We strongly doubt that elimination of fault will have any real or substantial effect on holding a marriage together. It may result in the saving of some time, which makes it desirable on that score, and may possibly be a benefit future-wise to the children involved in the proceeding. It is believed that certain inequities may result by reason of the elimination of fault or as a result of the method by which the dissolution of marriage is granted. First, [the Family Law Act, California, 1970] itself provides that the property of the parties, community or quasi-community, shall be divided equally except where economic conditions indicate otherwise. Surely it will follow that a court having no knowledge at the time of the dissolution as to the real reasons or causes for the separation will almost always divide the property equally regardless of the equities of the situation. There are no protective provisions left in the ...Act permitting the court to use its discretion in awarding greater shares of community property or quasi-community property to protect against a future inability

to collect an alimony award. In addition, the provisions that both of the parents are in effect equally responsible for the support of the children may tend to encourage a feeling that the community property of the wife, or at least the income therefrom, may be considered in orders for the support of minor children. We do believe that in the situations which would normally be contested that the court should be fully informed as to the basic causes resulting in the deterioration of the marriage and the proposed dissolution." (67)

Although some of the criticisms of the adversary process must be tempered by the realization that divorce proceedings are infrequently contested at trial, the consequential ritualistic procedure in undefended divorce proceedings itself provokes condemnation on the grounds that it is inappropriate and too costly to adjudicate such proceedings in the Supreme Court, that it facilitates divorce by consent in flagrant disregard of statutory requirements, and that it promotes unconscionable settlements as the price to be paid for a "simple" and expedited divorce. It will be recalled that the Honourable James C. McRuer directed his criticism to the cost of instituting uncontested divorce proceedings in the Supreme Court. (68) The criticism that uncontested divorce procedures facilitate divorce by consent which is in direct conflict with the statutory criteria or grounds for divorce has been articulated by academicians, by family counsellors and by the judiciary. Professor Herma H. Kay, analysing the position in California, has stated:

"[The] number of divorces that are uncontested is a significant proportion of the total divorce complaints filed. The Report of the Governor's Commission on the Family reproduces 'a typical example of the melancholy and perfunctory litany of uncontested divorce' on the ground of extreme cruelty. ...

The California situation thus illustrates the wide gulf that exists between theory and practice in the divorce area. ...Nor can it be supposed that the judges are unaware of the reality that is but thinly concealed behind the masks of the courtroom players. California attorneys report an uncontested divorce which takes more than fifteen minutes of the court's time is rare indeed and that the average case occupies no more than ten minutes. The plaintiff and her witness have been rehearsed in their parts by the attorney; sometime the rehearsal becomes almost too letter-perfect. ...The uncontested divorce, then, is intended to beguile neither its participants nor its specialized audience. It seems clear that the matrimonial offense theory of divorce does not accomplish its primary end of guarding society's interest in preserving marriage by preventing divorce except upon clearly established statutory grounds. Rather, the existence of a well-established legal charade with a script written by divorce lawyers and acted out by the parties to permit the judge to achieve a result permissible by the letter of the law but forbidden by its spirit suggests that the law's present response to the divorce problem has been strongly influenced by unarticulated and imperfectly understood human impulses." (69)

Corresponding criticisms of uncontested divorce proceedings in the State of Washington have been postulated by Alice O'Leary Ralls, Supervisor of the King County Family Court, who stated:

"The average hearing time for uncontested divorce cases in King County is approximately six minutes. Six minutes to examine a problem which has its roots in the whole lives of a man and his wife, a divorce which may scar the children of that couple forever. Though they have sought a divorce, many women are astonished and even upset by the assembly line technique and the ease and speed with which they are legally separated from the men with whom they had lived for years and to whom they have borne children.

Our county's shocking divorce rate, the highest in the world, could be cut to a great extent if we tried to cure sick marriages by treatment instead of rushing them into the execution chamber of divorce." (70)

Similar opinions have been expressed by Judge Paul W. Alexander, who observed:

"One trouble with guilt as the criterion of divorce is that it virtually assures the mortally feared and hated 'divorce by mutual consent'. Few things are easier of proof than the fault of the other spouse -- especially if he isn't there to answer the charge, as is true in 85% to 95% of cases. That is why it is proclaimed with such verisimilitude that we now have divorce by mutual consent in almost all jurisdictions. ... [One] almost never hears of an earnest divorce seeker being thwarted." (71)

It is unquestionable that the above criticisms cannot be confined by geographic boundaries and that the position in Canada corresponds to that in the United States. Thus, the submission of the Honourable James C. McRuer to the Special Joint Committee of The Senate and House of Commons on Divorce specifically refers to the "pure formality" of uncontested divorce proceedings in the Supreme Court. (72) The "perfunctory litany" of uncontested divorce proceeding in Canada is also exemplified in a text written by two Canadian practitioners specializing in family law matters,

who have reduced the relevant questions to be asked in uncontested divorce proceedings to a simple standard form. (73)

A vigorous defence of the corresponding procedure in uncontested divorce proceedings instituted in England has been articulated by Mr. Justice Scarman, Chairman of The Law Commission of England. He has stated:

"The first and fundamental question is: do we need judicial divorce? Or have we, in practice if not in theory, already abandoned it? ...Today the great majority of divorces are granted after a hearing of ten minutes or so before a Commissioner, a hearing in which usually only one of the spouses, the petitioner, gives evidence. Is this a genuine judicial process, or does it mean that, whatever the theory of the law, there has in practice, in the great majority of cases, been submitted a rubber stamp for a genuine trial and finding by a judge?. ...

It might...be said that society's interest could be adequately, and far more cheaply, safeguarded by divorce being made the subject of administrative, not judicial decision -- for example, available in some sort of register office on application of one spouse in certain defined circumstances, or upon the filing of a consent. The objection, as I see it, to divorce by administrative process, is that there could be no assurance either to the public that its interest were being safeguarded or to the spouses that justice was being done in their case. ...Justice to the spouses and to the interests of society requires, I suggest, that divorce be available only by judicial decision so that all may appreciate that the various conflicting interests that are bound to arise and need adjusting are being properly and responsibly assessed and met.

If, therefore, judicial divorce is to remain the basis of the law, is one to tolerate the present practice whereby divorce is obtained in undefended suits? Is the undefended suit a mockery of the judicial process? The undefended suit attracts a lot of ill-informed criticism. Whatever may have been the sins of the past, those now concerned with the administration of divorce justice know that in the great majority of cases a genuine matrimonial offence is proved, and that the fabrication of evidence, the misleading of the Court, e.g. a hotel bill from which the Court is asked to infer adultery that in fact never took place, are rare phenomena. The fairer view of the undefended divorce suit is to regard it as the unsubmerged tip of the iceberg. Let me explain what happens in the average undefended suit.

There has, of course, been a breakdown in the family life. The spouse who wants relief goes to a solicitor, who takes a statement, makes investigations, assembles evidence and gives the instructions for the drawing of a petition for divorce. There will be in most cases be children. He will draw the attention of his client to the necessity, whether or not the client wants the custody of the children, of satisfying the Court that proper arrangements are being made for their care and upbringing. He will advise his client that unless the Court is so satisfied the remedy of divorce will not be available. If the client be the wife, he will investigate her means of support and set on foot proceedings designed to support her and the children both pending the suit and after decree. Most of these ancillary matters can fortunately be satisfactorily dealt with by negotiation and agreement between husband and wife. If they are not, there will be judicial hearings either before a divorce or district registrar, or the judge in chambers. Hardly a breath of all this preparatory work, which is based upon the premise of judicial investigation, albeit in private on matters of maintenance and custody, will reach the open court when the undefended suit is heard; at the best there will be a reference to arrangements made with a view to obtaining the Court's approval of them. After the hearing, when a decree nisi will have been pronounced, there will be further negotiations

about maintenance of the wife and the children in custody, and in the absence of agreement the registrar and the judge in chambers will find themselves deciding judicially questions of great social importance in relation to the future of the fragmented family's life. It is a complete misconception to assess the value of the judicial process as at present exercised by looking only at the unsubmerged tip -- the ten minutes taken in open court to prove that which is uncontested, namely, the matrimonial offence. Although one can criticize the substance of the divorce law and the present machinery of its administration, to base criticism on the undefended suit is to ignore the full workings of the judicial process that it involves.

There is a further very practical advantage secured by the undefended divorce suit. If one accepts that divorce should not be available by administrative process, there is a danger that one will move to the extreme opposite view that every family life which has broken down should be subjected to full investigation, that the Court, must, in the interests of justice to the spouses and society, carry out a complete post mortem. Put simply, there are just not enough lawyers in our community to give effect to such counsels of perfection. Complaints of expense and delay are common enough already. A full inquisitorial attack upon every married life brought before the Court in divorce proceedings would add immeasurable to both and would, in the end, bring into disrepute the very thing it wishes to preserve, namely, divorce by judicial process.

What is wrong with undefended divorce is not that it exists--indeed, I think it is a valuable exercise of judicial responsibility--but that it has to proceed on the basis of a divorce law out of touch in many respects with the facts of life and that it conceals in its administration the fiction to which I have already referred, namely, that it is available only in the High Court." (74)

The third criticism, namely that the ritualistic procedure in uncontested divorce proceedings promotes unconscionable settlements as the price to be paid for a simple and expedited divorce, is indirectly supported by empirical evidence adduced by Professor Gorecki in research undertaken on the operation of a Polish statutory provision whereby "divorce cannot be granted if the petitioner alone was guilty of breakdown, unless the defendant consents to divorce". Professor Gorecki, after interviewing divorce litigants and lawyers, concluded that this provision resulted in consents being withheld from motives of malice, revenge and vindictiveness, and that excessive alimony and inequitable divisions of matrimonial property ensued as a consequence of the statutory requirement of consent. The aforementioned statutory provision was amended in 1964 to provide that "divorce cannot be decreed if the petitioner alone was guilty of breakdown, unless either the respondent consents to divorce or the refusal of his consent is, in the given circumstances, contrary to principles of social life in the community". Professor Gorecki observes that this statutory amendment was enacted for the purpose of invalidating refusals of consent based on improper motives and preventing excessive demands for compensation as the price for giving consent. (75)

The findings of Professor Gorecki lend support to the opinion that the procedure in uncontested divorce in Canada effectively precludes judicial scrutiny of settlements negotiated by divorce litigants and their lawyers and accordingly contributes to the risk of unconscionable and inequitable settlements. In the words of one recent critic,

"With regard to custody and maintenance pursuant to divorce, Canadian courts are apparently quite happy to accept all but the most glaringly inappropriate schemes agreed to by the parties and their counsel out of court..." (76)

Summary of criticisms of existing procedures in the Supreme Court

The principal objections to the exercise of jurisdiction by the Supreme Court over matrimonial and familial proceedings, and especially divorce proceedings, may be summarized as follows:

1. The procedure in the Supreme Court is unduly formal, involved and expensive.
2. The procedure and philosophy of the Supreme Court is not conducive to a therapeutic or conciliatory approach to matrimonial or familial proceedings and thus frustrates the objectives of preserving the stability of marriage and promoting the quality of family life.
3. The ritual of the typical undefended divorce proceeding promotes injustice and disrespect for the law and its administration. (77)

ARGUMENTS IN FAVOUR OF THE SUPREME COURT RETAINING JURISDICTION IN MATRIMONIAL AND FAMILIAL PROCEEDINGS.

It has frequently been asserted that the fundamental significance of divorce and other matrimonial causes requires jurisdiction to be vested in the Supreme Court. Thus, the Report of the Royal Commission on Marriage and Divorce, (England) 1951-1955, stated:

"The principle which has hitherto prevailed is clearly stated in the...Report of the Gorell Commission:

'...the gravity of divorce and other matrimonial cases, affecting as they do the family life, the status of the parties, the interest of their children, and the interest of the State in the moral and social well-being of its citizens, makes it desirable to provide, if possible, that, even for the poorest persons, these cases should be determined by the superior courts of the country assisted by the attendance of the Bar...'

We accept that principle as sound, and as being just as applicable today as it was in 1912. We also agree with the view of the Denning Committee that the manner in which divorce is effected does influence the attitude of the community towards the status of marriage. The Committee said:

'If there is a careful and dignified proceeding such as obtains in the High Court for the undoing of a marriage, then quite unconsciously the people will have a much more respectful view of the marriage tie and of the marriage status than they would if divorce were effected informally in an inferior court.'

We endorse these words:" (78)

It is submitted that the conclusion of the Denning Committee cited above is open to question in view of the trenchant criticisms of the existing procedure in uncontested divorce proceedings.⁽⁷⁹⁾ Nevertheless, the basic assertion that divorce and other matrimonial causes merit the

attention of the Supreme Court appears logically irrefutable. Such proceedings are of fundamental significance to the State as well as to the litigants and justify, if not require, the consideration of the best qualified judges, who inevitably are to be found in the Supreme Court by reason of the prestige and salary attaching to such appointments as compared with those in other courts. It is unrealistic to assume that the quality of judicial appointment is uniform in all courts and that lower courts can attract appointees who are as well qualified as those in the Supreme Court. The lack of necessary counselling and support services may constitute a primary defect in the Supreme Court but does not undermine the fact that, in many matrimonial proceedings, complex legal, as distinct from inter-personal and social, issues may ultimately require judicial determination.

It should also be observed that constitutional limitations presently preclude the transfer of jurisdiction over many types of matrimonial and familial proceedings to an inferior court. Accordingly, if any constructive attempt is made to avoid the unfortunate consequences of the existing fragmentation of jurisdiction by vesting a comprehensive and integrated matrimonial and familial jurisdiction in a single court, the present constitution requires that such a court be the Supreme Court in each province. Although constitutional limitations ought not to be regarded as a self-sufficient reason for retaining or expanding the jurisdiction of the Supreme Court, the difficulty likely to be encountered in any attempt to amend the Constitution cannot be ignored in view of recent experience in Canada. The simplistic solution of transferring

legislative jurisdiction over "marriage and divorce" from the Federal Parliament to the provincial legislatures, even if politically feasible, would not resolve the constitutional limitations inherent in section 96 of the British North America Act, which requires that certain matrimonial proceedings fall within the exclusive competence of the Supreme Court.

Implicit in any submission which favours the retention or expansion of the jurisdiction of the Supreme Court is the assumption that the defects of the existing procedures may be eliminated. The inaccessibility of the Supreme Court and the consequential delay and increased costs of instituting proceedings therein could presumably be effectively resolved by a decentralization of the administration of justice by the Supreme Court so as to ensure that resident Supreme Court judges would be available to meet local and regional demands. Such decentralization already exist in other courts and there appears to be no insuperable obstacle precluding its operation in the Supreme Court. Furthermore, the present neglect of the Supreme Court to promote reconciliation or the amicable settlement of issues arising incidentally to divorce could be met by the provision of adequate counselling staff and conciliation machinery in the Supreme Court.⁽⁸⁰⁾ Conversely, if a need for expedited divorce procedures is established in undefended proceedings, such procedures could be introduced within the context of the Supreme Court.

LIMITATIONS ON THE ROLE OF THE LAWYER AND THE LAW UNDER THE PRESENT
LEGAL AND JUDICIAL PROCESS

It is possible that some of the criticisms of the existing legal and judicial process in the Supreme Court could be construed as an indictment of the competence and integrity of the legal profession. Such an interpretation of the criticisms would, however, involve distortion. The inadequacies and defects of the present regime are a reflection of conditions and circumstances which substantially lie beyond the control of the legal profession. Notwithstanding protestations to the contrary, existing laws, both substantive and procedural, militate against the professed intention of preserving the stability of marriage and the quality of family life. Under existing conditions, the courts and the lawyers cannot achieve these ideals.

The limitations on the role of the Supreme Court as presently constituted may be briefly summarized. The inaccessibility of the Supreme Court with its consequential delays and concomitant demand for timely decisions, the absence of expertise or skill in the behavioural sciences which is endemic in the Supreme Court and aggravated by the rotation of judges under the circuit system and the lack of support staff to promote therapeutic and conciliatory measures, render the constructive resolution of matrimonial and familial conflicts beyond the boundaries of possibility, irrespective of the attitude of the judiciary towards such an approach. (81) It must also be recognized that a primary function of the judge is to adjudicate and this function cannot be subverted by his direct involvement in counselling the parties

to a dispute, because, if such counselling proves unsuccessful, the judge is unlikely to be regarded by the litigants as an impartial arbiter

Similarly, the legal practitioner is ill-equipped to ascertain whether parties who seek recourse to legal proceedings would benefit from counselling, and, a fortiori, cannot evaluate the prospects of reconciliation. The limitations of the lawyer who conscientiously seeks a constructive resolution of matrimonial and familial conflicts appear to be self-evident.⁽⁸²⁾ The lawyer is trained in the law but is generally unfamiliar with the art or science of marriage or family counselling, which requires a high degree of skill, special training and time-consuming analysis. The lawyer has neither the time nor ability to ascertain the prospective litigants' need for counselling. Furthermore, the lawyer has been imbued with the merits of the adversary system and his role as an advocate involves a partisan approach. This does not reflect on his integrity and is a duty imposed by the ethics of his profession which precludes him from representing parties who have, or may have, a conflict of interest. It militates, however, against effective counselling aimed at promoting reconciliation since this can best be achieved by direct contact and communication with all affected parties.⁽⁸³⁾ Accordingly, even the most conscientious and well-meaning lawyer can do little more than acquaint his client with available counselling services in the community and induce the client to seek the help of such agencies before instituting legal proceedings.⁽⁸⁴⁾

This limited goal may itself be exceedingly difficult to accomodate insofar as it conflicts with the stated expectations and demands of the client.⁽⁸⁵⁾

It is submitted that this delemma would best be resolved by counselling services being available in the court to which recourse must be sought if dissolution of the marriage or other judicial disposition is to be secured.

The difficulties encountered by the lawyers and the courts under the existing legal and judicial process are accentuated by the substantive law which places undue emphasis upon the fault or offence concept and makes inadequate provision to promote reconciliation between the spouses.⁽⁸⁶⁾ Although attempts were made to offset these limitations of the substantive law in the Divorce Act, 1968, which introduced marriage breakdown as an alternative criterion for divorce and amended the law relating to collusion and condonation, these changes have made no substantial contribution to the constructive resolution of matrimonial and familial conflicts.⁽⁸⁷⁾ Experience has also indicated that sections 7 and 8 of the Divorce Act, 1968, which were enacted for the express purpose of promoting reconciliation between spouses who institute proceedings for divorce, have failed to achieve their purpose. In the words of one recent critic:

" The closest the 'divorce courts' come to the matter of conciliation is in complying with the statutory requirement to enquire of '...the petitioner, and where the respondent is present, to the respondent, ...to ascertain whether a possibility exists of their reconciliation unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so...' (88)

Lawyers have a similar onus to enquire of their clients regarding the possibility of reconciliation. The Act requires that all divorce petitions be endorsed to the effect that this onus has been discharged.(89) In practice it is clear that these provisions are dealt with in a very perfunctory way by judges and counsel alike--and not without good reasons, for all things considered, by the time a divorce action is initiated in Canada, the marriage has likely been beyond repair for a considerable length of time." (90)

It appears obvious, in retrospect, that effective implementation of statutory reconciliation provisions requires a de-emphasis of adversary procedures and the provision of adequate counselling services to complement the contribution of the lawyers and the courts to the resolution of matrimonial and familial disputes.

In conclusion, the responsibility for the present inadequate state of affairs cannot be attributed exclusively, or perhaps primarily, to the legal profession and the courts. The following observations made in the context of the role and responsibility of the juvenile court in the treatment of delinquency would appear applicable with respect to the general treatment and disposition of family law matters in the Canadian courts:

"But the courts should not be made the sole scapegoat. The responsibility for the present state of affairs in the field of juvenile delinquency must be shared by others:

Legislators (a considerable number of whom are lawyers), who enact laws governing the courts, which often are outdated, fail to incorporate the latest legal and social concepts;

Overly-budget-conscious officials who fail to provide funds for adequate court staffs;

Administrators of public and private programs (upon which the court must depend), who might well devote more energy to self-improvement rather than bemoan the deficiency of the courts;

Learned groups who find it easy to criticize the courts and theorize on delinquency, but are hard put to come up with effective answers or remedies; and

General public attitude, which on the one hand demands greater protection, while on the other refuses to support the establishment of sound prevention, control, and correctional programs." (91)

EXISTING PROCEDURES IN THE SUPREME COURT: TENTATIVE CONCLUSIONS

Family law has done little to promote the therapeutic treatment and resolution of inter-spousal and familial conflicts. With the notable exception of the Juvenile and Family Courts, the law has developed few, if any preventive or therapeutic techniques to promote the stability of marriage and the quality of family life. In the words of Judge Alexander, "The only remedy it has devised for marriage failure is the drastic one of surgery, amputation, the spurious remedy of divorce". (92)

The tacit assumption underlying the present legal and judicial process in the Supreme Court appears to be that the law and the courts have no major role to play in the constructive resolution of matrimonial and familial discord and that intervention by the legal and judicial process is predicated on the fact that the matrimonial and familial relationship is no longer subsisting as a social reality. The role consigned to the legal and judicial process has thus been confined to the termination of the marital status, the definition and regulation of inter-spousal financial and property rights and obligations, and the disposition of issues respecting the care and upbringing of children.

It is submitted that such a negative approach can no longer be advocated or supported and that constructive steps must now be taken to resolve inter-familial conflicts. This will require marriage and family counselling services to be made readily available in or to the courts so that substantial efforts may be made to promote reconciliation of the spouses, and, where this is not possible or desirable, to promote an amicable and equitable settlement of any issues arising consequentially upon judicial dissolution of the marriage, including dispositions of matrimonial property and assets, inter-spousal maintenance, and the custody, care and maintenance of children of the family.

Many lawyers, judges, psychiatrists and social workers recognize that the adversary procedure of the Supreme Court is inappropriate in divorce and other matrimonial and familial proceedings. It tends to discourage reconciliation and to intensify animosities and inter-familial conflicts. The statutory introduction of non-fault grounds for divorce has offered some escape from the adversary system but so

long as the traditional offences are retained as grounds for divorce, it will not be possible to eliminate the worst aspects of the adversary procedure. It is submitted, however, that some of the defects of the adversary procedures may be avoided and others mitigated by the philosophy and procedure of the Family Courts and their specialized support staff being more generally adopted in the treatment and disposition of matrimonial and familial disputes. (93)

The more substantial advantages that might be achieved by reform of the substantive law so as to eliminate or de-emphasize the fault concept and a contemporaneous reform of the legal and judicial process would appear to be evidenced by recent experience in California. Pursuant to the Family Law Act (California), 1969, radical changes were effected in the substantive and procedural law regulating marriage and divorce. The most significant changes involved the introduction of divorce on the two grounds of "irreconcilable differences" and incurable insanity in substitution for the previously existing matrimonial offence regime, and the elimination of fault as a criterion in the adjudication of inter-spousal maintenance and property disputes. Commenting on the changes effected by this legislation, the Honourable William P. Hogoboom, Judge of the Superior Court, Los Angeles County, California, and Supervisory Judge of the Family Law Departments, has stated:

"In large measure, the adversary approach to divorce proceedings has been limited by the elimination of wrongdoing as a basis for awards of property or support. This greatly reduces the necessity for the type of aggressive pretrial and courtroom techniques conducive to much of the hostility in contested cases. Legal efforts can now more productively be expended on matters relating to property valuation, accounting and tax problems, rather than the fault of one marriage partner or a third party. ...

The trial of contested matters under the Family Law Act is more pleasant for the parties, counsel and the court. The elimination of fault testimony greatly reduces acrimony, and the trial of property matters proceeds more in the manner of other civil or commercial litigation. It is far easier to resolve these matters in an atmosphere free from the heat that fault testimony invariably engenders. The elimination of any monetary incentive for fault finding has had a beneficial effect on court proceedings. Most contested custody cases, sadly, retain their former bitterness. The abolition of the concept of 'fault' as the basis for relief in marital disputes is a long-overdue reform. It is a civilized approach to a vexing problem. Coupled with the limitation on adversary practice, it can alleviate many of the painful conflicts which develop when a marriage has ended in fact.

It is doubtful whether valid social goals are achieved if courts, or any branch of the government, decide whether its adult citizens are to remain married against their will. The adversary common-law system has proven ill equipped to determine the degree of comparative fault or merit between married persons, or to make awards based upon those findings. Under the Family Law Act in California, the courts still adjudicate the important social and economic aspects of the problem: child custody, support and division of property. No one can claim any law a panacea. The Family Law Act is no exception; but, it appears to be well designed to bring some sanity into deeply complex and emotional matters." (94)

MATRIMONIAL AND FAMILIAL PROCEEDINGS IN THE FAMILY COURT

To complement the above analysis of the philosophy and procedure of the Supreme Court, the writer now proposes to outline the present jurisdiction and operation of Family Courts in Canada.

The concept of a Family Court is a product of the same philosophy as led to the creation of the Juvenile Court in the early part of the twentieth century. Just as the Juvenile Court was conceived as a specialized tribunal which would attempt to resolve the problems of neglected or delinquent children by rejecting a punitive approach and adhering to the concept of rehabilitation, with informal procedures aimed at securing a disposition in the best interest of the particular child, so also, the Family Court was conceived as a tribunal which would promote preventive and therapeutic procedures in an attempt to constructively resolve inter-spousal and inter-familial conflicts.⁽⁹⁵⁾

The evolution of the Family Court in Canada has been marked by substantial differences in the various provinces. Even today, only larger urban centres have full-time specialized staffs available to assist the judiciary in the constructive resolution of matrimonial and familial disputes.

Unlike many of their American counterparts, Family Courts in Canada do not constitute part of the Supreme Court and, accordingly,

their jurisdiction, though extensive, is confined by constitutional limitations whereby certain family law matters fall within the exclusive competence of the Supreme Court. The jurisdiction and organization of the respective Family Courts varies from province to province and, within some provinces, from court to court, and such variations render it difficult to define policies and standards applicable to all parts of the country. (96)

In general, however, the following definitions of the role and jurisdiction of Family Courts in Canada would appear accurate:

" Family courts are fully responsible judicial tribunals which provide a special social approach to certain family problems, and which centralize various legal matters relating to the family in one court equipped to provide this approach. Its methods of work include private hearings in which only those concerned in the case are present, social investigations, and probationary supervision or other follow-up services. ... Through the medium of the probation staff, operating in a counselling capacity, provision is made for the adjustment of family problems without official court action where the parties concerned desire such procedure.

... There is considerable [jurisdictional] variation from province to province. In most provinces family courts have jurisdiction over legislation dealing with the maintenance of deserted wives and children and legislation dealing with family disputes. School attendance, children of unmarried parents, and the admission of children to training schools also come under the court's jurisdiction in several of the provinces." (97)

" Society is in transition. There is dissonance as old established values clash with the new. Many are being challenged, censured and apparently abandoned. ...

Upon the social and economic integrity of the nuclear unit, the family, will depend the peace or the hostility manifested during this period of transition. An essential social objective must therefore be to sustain the unity and harmony of the family; to repair, where there is a breach; to reinforce the remainder of the unit where the breach is irreparable; to strengthen the inadequate; to control the weak; to guarantee individual rights; to enforce individual responsibilities.

The Family Court is in a singular position to contribute to this social goal. It must adjudicate questions of law, it must guarantee individual rights, enforce individual responsibilities. It must, fundamentally, be a court of law determining the rights and obligations of members of the family - as between husband and wife, parent and child. It has special broad jurisdiction over the children of the family. And yet, the family court is unique among all other courts in that it has a distinct social purpose. The public looks to this court for help towards that central social concern - the integrity of the family.

'...the importance of the community of a good family court system should not be measured simply in terms of specific questions litigated, but in relation to family social problems, present and potential...it is obvious that a court system dealing with family and juvenile problems plays a major role in the life and general well-being of a community'.

(Family Law Project Report to the Ontario Law Reform Commission - F.L.P.R.)" (98)

More specific guidelines as to the jurisdiction and organization of particular Family Courts in Canada may be secured from several provincial research studies. In Alberta, a substantial matrimonial and familial jurisdiction is divided between the Juvenile Court and the Family Court. The Juvenile Court is primarily concerned with jurisdiction over juvenile delinquency and neglected children, the latter jurisdiction being shared by the District Court. The jurisdiction and organization of the Family Court of Alberta has been summarized as follows:

"The Family Court of Alberta, which is a court of record, has the widest jurisdiction of any Family Court in Canada. Under the Family Court Act, a provincially appointed judge of the Family Court has jurisdiction with respect to:

- (i) maintenance orders (protection orders) for deserted wives and families under section 27 of the Domestic Relations Act;
- (ii) maintenance orders under the Reciprocal Enforcement of Maintenance Orders Act;
- (iii) certain charges against adults under the School Act, 1970;
- (iv) certain charges against adult persons under the Child Welfare Act;
- (v) charges triable on summary conviction under section 186(2)(a) [now section 197(2)(a)] of the Criminal Code (non-support charges);
- (vi) common assault charges under section 231(1)(b) [now section 245(1)(b)] of the Criminal Code, where a husband assaults a wife, a wife assaults a husband, or a parent assaults a child;

- (vii) charges triable on summary conviction under any other act or section where, in the opinion of the Lieutenant Governor in Council, it is appropriate for the judge of a Family Court to deal with them;
- (viii) enforcement of Supreme Court alimony or maintenance orders, but without the jurisdiction to vary the Supreme Court orders;
- (ix) custody of children whose parents are living apart from one another;
- (x) right of access to such children.

Upon his appointment, the Family Court judge is also appointed to the office of magistrate and acting in this capacity, hears matters under section 231(1)(b) [now 245 (1)(b)] and 717 [now 745] of the Criminal Code and section 100 of the Liquor Control Act, R.S.A. 1970, c. 211.

The procedure in this court is simplified. An applicant commences a proceeding by swearing an affidavit and serving all interested parties with written notice to appear at the hearing of the application. Many of the matters are heard without legal representation; the Legal Aid Plan covers the Family Court but has to cope with financial limitations. In matters of custody, access, maintenance and enforcement, an application is necessary for each and every issue to be heard by the court and each application is heard separately, although often on the same day. At the discretion of the judge, any matter may be heard in camera.

The organization of the more fully developed Family Court in Alberta includes more than the judicial machinery. By virtue of section 5 of the Family Court Act, probation officers, clerks of the Juvenile Court and other officers and employees appointed pursuant to the Juvenile Court Act, R.S.A. 1970, c.195, act as far as possible in the same capacity and have the same powers and duties in relation to the Family Court as they have in relation to the Juvenile Court. The probation officers are under the direction of the judges of the Family Court and perform such duties as are assigned to them by the judges. The term 'probation officer' in the Edmonton Family Court has been amended in practice to 'court counsellor',

which appears to us to be closer to an appropriate description of their function.

The services available to the Family Court include intake services to advise persons with marital or family problems as to the remedies available to them or to refer them to professional agencies and, if necessary, to prepare an affidavit or complaint initiating maintenance or custody proceedings and arranging to have the parties appear in court. They include an investigative service to examine the circumstances of the parties seeking custody of children and appearing at the hearing to give evidence as to the findings. They include legal services which, in some cases, are available to litigants and in others to the court itself and to court counsellors. They include the receipt and payment out of monies under maintenance orders and the enforcement of such orders. They also include the usual court reporting and administrative services.

The Family Court may exercise its jurisdiction throughout Alberta. There are Family Courts established in the five major cities--Edmonton, Calgary, Red Deer, and Lethbridge and Medicine Hat combined--and smaller operations in Fort McMurray and Grande Prairie. Under the Family Court Act, the jurisdiction of the judges is not restricted to particular districts and at the present time, there is the beginning of circuit court systems operating out of the five urban centres. ...

Although the Juvenile and Family Courts are set up as two separate courts of law, in practice, where there are Family Courts the two courts tend to operate as one. In Alberta all judges with Family Court appointments are also appointed Juvenile Court judges, so that in the five major cities all Juvenile and Family Court matters are heard by the same judges, acting either as Juvenile or Family Court judges. In the rural areas, where there are no Family Court judges, the provincial judges act in their capacity as Juvenile Court judges along with their other duties." (99)

Although the jurisdiction, structure and operation of the Family Court of Alberta does not reflect a national model, the above profile may facilitate some generalizations respecting the basic pattern of Family Courts in Canada. There is no Family Court in Canada which exercises a comprehensive and integrated jurisdiction over all matrimonial and familial proceedings. Divorce, judicial separation, alimony, and property dispositions all fall outside the jurisdictional competence of the Family Court. Essentially, the jurisdiction of the Family Court extends to three types of proceedings, namely, proceedings with respect to neglected children, delinquency proceedings, and summary civil or criminal proceedings respecting inter-spousal maintenance and the custody, maintenance and welfare of children. The Family Court is presided over by a provincially appointed judge and a specialized staff is assigned to the court to undertake counselling, investigatory and administrative functions. The proceedings are as informal as circumstances permit and attempts are made to promote the resolution of disputes by agreement between the parties rather than by judicial disposition after trial. The parties, are seldom represented by legal counsel in inter-spousal disputes and accordingly there is less emphasis upon adversarial procedures which more typically reflect adjudication in the Supreme Court.

The philosophy underlying the structure and operation of Family Courts in Canada is that preventive and therapeutic measures can be

taken to constructively assist spouses and family members to resolve their problems and re-establish the matrimonial or familial relationship on a firm basis. There would appear, however, to be a substantial gulf between the philosophy underlying the Family Court and the extent to which these ideals are obtained. Thus the Special Joint Committee of the Senate and House of Commons on Divorce rejected the suggestion that divorce jurisdiction should be vested in the Family Court on the following grounds:

"The basic argument against vesting jurisdiction in the Family Courts is a practical one. Not every province has an established system of Family Courts that are qualified to deal with divorce cases. Some Family Courts may be competent, but your Committee believes that, at present, such courts are in a minority. In the future, as the Family Courts develop, the problem may be worthy of further consideration, but at present your Committee is opposed to jurisdiction in divorce matters being given to Family Courts." (100)

The most trenchant criticism of Family Courts in Canada has been articulated by Herman Litsky, Judge of the Juvenile and Family Courts of Calgary, who has stated:

"Courts are reputed to dispense justice and equity at all times. This is an amicable aphorism but it is not, however, accurate today, if indeed it ever was. Courts, and particularly the family courts of Canada, are the antithesis of justice and equity at all times...

In essence, the family court is a poor man's court. The average salary of the breadwinner who appears there is less than \$5,000, which confirms the view that there is a law for the rich and a law for the poor.

Through this court, with monotonous regularity, pass stream after stream of human problems that should, but do not touch the heart of our society.

Through this court comes the deserted, divorced, and destitute woman and all her concomitant crises...With varying degrees of shame, guilt, hostility and embarrassment, she is subjected by welfare bodies throughout Canada to attend the court as a condition of receiving her substandard allowances. In essence, administrative coercion is applied, without the attempt being made to fully understand her problem, thus creating more hostility and reducing the chances for salvaging her marriage through reconciliation.

In the main, the court concentrates only on the consequences of desertion and divorce. Reconciliation is rarely observable, the possibility of it having been stifled by the ever-increasing referrals of the public assistance agencies.

...In a few moments the judge is given a synopsis of sorrow, legally capsulized, the purpose of which is to find the man liable for his disloyalties. Only the liabilities of marital life are considered; these are rarely tempered with accounts of the happy periods that there may have been in this marriage. Infidelity, emotional and physical cruelty, refusal to supply the necessities in life, alcoholism and ultimate desertion provide the foundation of the maintenance order, often set lower than the amount which the public assistance agencies supply the wife. After this legal questioning, which is divorced from the real needs of people (other than their monetary ones), the case is closed. The couple invariably part and go their separate ways, the husband probably already living common-law, and the wife, if loyal, destitute and destined to the loneliness of lifelong chastity by default. Ultimately, she too in her need to be recognized and loved gives way to a state of common-law, usually condoned by the welfare agency which rationalizes that it is at least a family unit.

The courts are not entirely without services for the poor. They have set up what they call reconciliation resources where court counsellors, often quite skilled in the psychodynamics of family life, attempt to counsel the wife and husband if possible. Since there is no coercion to attend counselling sessions—although a judge may direct it—few take advantage of it because in the main the case is at a point of no return once an appearance is made in the court.

Custody becomes a contentious issue. The mother, in making application to the court, will receive guardianship of the children during their formative years. Fathers have reciprocal rights only on paper when it comes to the delicate matters of custody. Maternity takes precedence over paternity, and no matter how much love a man can give to his children, his rights are usually put aside — other than those of the restrictive condition 'visiting privileges', which invariably adds to his estrangement from the children. ...

Forget about the grand legalisms that once were considered in domestic relations legislation across Canada. It is sad but true that the family court's function today is primarily the collection of money. The family court is a confused configuration of pieces of social legislation professing a hollow philosophy. It is an unfulfilled promise, with only a bureaucratic bank account to show for it and with the poor as depositors. ...

The family court operation in reality represents diminishing returns: more and more maintenance orders are directed and enforced and put into the general revenue of the government, but less and less time is spent with the fundamental philosophy of the court — reconciliation.

To facilitate collection, new and modern accounting techniques are adopted throughout Canada—computers, efficiency experts and financial consultants refine and design new approaches to the fine art of collecting accounts. From the welfare administrations flow a steady stream of recipients, including the defaulting and deserting husband. Mechanically he appears like some worn out money machine, already drained by other creditors, with the court hoping—usually in vain—that it will hit a judicial jackpot.

Thus the judge becomes an accountant, not an adjudicator of cases, coerced into making orders not because they are good for the family but because millions of dollars of welfare money are being allocated and the deserting husband must be required to replenish as much of it as possible. And what of the money spent to keep a family barely afloat on the seas of inflation and unemployment? What portion of that money is used for qualitative research for solutions? Research to *save* family units, which would ultimately be cheaper than perpetuating the poverty that takes away the initiative and integrity of the public welfare recipient? Little if any. ...

But, let us not be too quick to lay all the blame on the present court structure or its laws. Ostensibly, the philosophy of the court is to work for the best interests of all people, no matter how nebulous their problems. However, realistically, maintenance orders and their collection are the practical tasks of any court whose judicial duties deal with marriage breakdown. Unfortunately, the courts are dictated to and controlled by a restrictive and unimaginative welfare system. This system, however well-meaning in serving the poor, has not discovered qualitative methods to deal with growing welfare budgets except to institute large maintenance and recovery branches directing more and more that the putative father and deserting husband must pay--pay, in effect, to defray the costs of public expenditure. In essence, the court is merely used as a sanctioning instrument to collect unpaid accounts. ...

There appears to be only one real solution at present to bringing any relief to the welfare recipient. Canadian legal and welfare bodies could, of course, consider setting up family desertion units, as in Chicago, for reconciliatory

purposes; they could consider restructuring the courts; hiring more professional social workers and volunteers (judicial candy-stripers); setting up private or pastoral counselling agencies; carrying out more research into a better legal aid system; paying higher social assistance rates and, finally, hiring more professionally oriented administrative welfare officers with a concern for the poor.

All these are proper courses but not answers in themselves.

There must be a restructuring of power that would give a voice to the poor in their quest for equality and a decent life. The poor are not consulted about what services are offered to them, which, in my view, accounts for the failures of welfare agencies and courts alike to ameliorate poverty. These agencies merely convey to the poor a sense of the exploiter and the exploited through the traditional 'charity' mystique. Recently, groups of rebellious welfare recipients have formed across Canada to express their discontent. But there must also be some form of advocacy that involves the poor in the legal arena. Further research is needed, not only into poverty and law, but also into exposing inequality in all its aspects." (101)

Because of its alien procedures and ancillary counselling programs, the Family Court is looked upon as an enigma by the legal practitioner. The attitude of the legal profession appears to be reflected in the following observations of a Toronto practitioner:

"[The] family court is jammed, all across Canada. The hearing the woman gets here is pretty much a slapdash affair, especially if she has no lawyer.

Lawyers work in family court reluctantly. They [are] trained in arguing cases in a certain way, and the family court wants no part of this method. It [is] interested only in getting money quickly into the woman's hands, and this

runs counter to all the training lawyers have had. The court's philosophy is really based on getting money into her hands fast enough to keep body and soul together, and not to make her a burden on welfare. So what she gets generally is a sum that just barely exceeds welfare payments. Family court is [not] interested in law at all—just in getting her off the welfare rolls.

The system is good in some ways—it does get some money to the woman. It[is] also bad—she probably does [not] get a really justifiable amount." (102)

It would be naive to assume that the lawyer's criticism of the Family Court is premised solely on the above grounds or on a distrust of the methods of the behavioural scientist which allegedly underlie the specialized approach of the support staff attached to the Family Court. The inadequacy of legal aid funds and the inability of the litigant to pay substantial fees to secure legal representation in matrimonial or familial proceedings instituted in the Family Court inevitably contribute to the low esteem with which the practising lawyer typically regards the Family Court. There is, indeed, substance to the following allegations of Herman Litsky, Judge of the Juvenile and Family Courts of Calgary:

"Lawyers, the cornerstone of any court, have been reluctant participants in the judicial processes of the family court. Their professional excuse is that the court merely collects money for women without any formal procedures. This is a quite typical rationale for most lawyers, but one must examine motives closely. ...

First, let us explode the myth that lawyers feel the court is too informal in terms of due process. It is true that although statute law is quite explicit, rules of procedure and case law have not been fully implemented as in other fields of the legal profession. The real problem is, however, that the lawyer is a creature of procedural habit, prone to precedent based on his legal training in law school. In the main, the law school has not stressed to students that there is more to law than adversarial proceedings and that domestic relations matters are based on social and economic problems. The truth is that lawyers are trained in the entrepreneurial system and the family court offers no great regard in the form of a fee. Therefore their excuses really mask an indifference to the philosophy of the court, which weakens it all the more. But, how quick and professionally related to the court they would become if they were offered a so-called better legal forum for the collection of their fees rather than of money for welfare administrations!

It is disappointing for social workers and for judges of these courts who must cope with such attitudes. Lawyers are reluctant participants because of indifference and the inability to expand their own legal expertise. They prefer the fatter fee which they can be assured of in superior court, especially in divorce cases. ...

Over the past few years, however, I have noticed a new breed of lawyers, both socially and legally astute, with an inquiring mind, coming into the family court. Not only are these lawyers advocate-conscious about points of law, which invariably strengthens procedures, but they are also dedicated to the principle that there is something more to a client than money.But, too often, the allure of success in practice induces lawyers to leave the storefront environment for the more comfortable heights of the legal profession." (103)

In conclusion, it may also be observed that the greater degree of informality in the treatment and disposition of matrimonial and familial matters by the Family Court does not inevitably reflect a difference of philosophy from that espoused in the Supreme Court. The substantive law which is administered in inter-spousal maintenance proceedings instituted in the Family Court is premised on the fault or offence concept and there is no generally accepted method of circumventing the adversary procedures which consequentially ensue. Moreover, the role of existing counsellors in the Family Courts is not well-defined and there is a lack of any consistent method or policy to interpose a therapeutic approach. This is clearly illustrated by the fact that litigants who are represented by legal counsel by-pass the "intake procedures" of the Family Court. It appears somewhat inconsistent that persons with legal representation avoid counselling services and if therapeutic approaches are valid, there is little or no justification for the absence of their uniform application to all persons who have recourse to the Family Courts.

Constitutional Problems Arising From A Unification of The Judicial
Administration of Family Laws

The Institute of Law Research and Reform of the University of Alberta echoes a common criticism when it states, ⁽¹⁰⁴⁾

"We believe...that the fragmentation of the jurisdiction of the courts which administer Family Law and the overlapping and competition between the jurisdictions of different courts gives rise to problems which require a reform of the existing court structures...

Their answer and that of others to these problems is the consolidation of the hearing of all the family law matters within one court. Such a plan faces constitutional problems and it is intended herein to suggest a method of unification which will avoid these problems. It must be stated at the outset that a change in the grounds upon which persons' rights and obligations in family matters are determined may enable the desired unification to take place in an administrative tribunal rather than in a court, but constitutional problems arising from this possibility cannot be usefully canvassed until new grounds for determining such rights and obligations are put forward. In the interim, the proposed scheme envisages that, although the officers hearing certain family law matters may change, their technique of decision-making will remain the same as was that of the officers who formerly heard such matters.

In respect of matters substantively within exclusive provincial legislative competence, it appears that unless exceptional circumstances arise only the provincial legislatures can confer jurisdiction on

courts or tribunals; Parliament cannot do so.⁽¹⁰⁵⁾ When they do so, however, they are subject to two limitations: first, they apparently cannot confer jurisdiction on federal courts or tribunals, only on provincial ones;⁽¹⁰⁶⁾ secondly, they must confer jurisdiction of a type broadly conforming to that normally exercised only by provincial superior court judges on those judges alone and on no other persons, whether other officers of the provincial superior court⁽¹⁰⁷⁾ or members of any other provincial courts⁽¹⁰⁸⁾ or tribunals.⁽¹⁰⁹⁾

In respect of matters substantively within exclusive federal legislative competence, either the provincial legislatures⁽¹¹⁰⁾ or Parliament⁽¹¹¹⁾ can confer jurisdiction on courts or tribunals, subject to the usual rule regarding paramountcy of federal legislation.⁽¹¹²⁾ If it is the provinces which are conferring such jurisdiction, they are subject to the same two limitations which were mentioned above in connection with their conferring of jurisdiction in respect of matters substantively within their exclusive legislative competence. If it is Parliament which confers such jurisdiction, it is subject to neither of the above two limitations, that is to say, it can confer jurisdiction on any agency whatsoever, whether federal or provincial, whether court or tribunal.⁽¹¹³⁾

What are the implications of this for an attempt to unify administration of family laws? First, it should be noted that legislative authority in the family law area is divided between Parliament and the provincial legislatures.⁽¹¹⁴⁾

Because Parliament cannot normally confer jurisdiction in respect of those matters within exclusive provincial legislative competence, the provincial legislatures must presumably be involved in any unification scheme and so the two limitations on them mentioned above assume crucial importance. The first of these limitations necessitates that administration of family law be unified in a provincial rather than federal agency, whether court or tribunal. Moreover, since it is submitted that there are some matters within exclusive provincial legislative competence in which the provinces must confer jurisdiction on provincial superior court judges,⁽¹¹⁵⁾ the second of these limitations further restricts the field of choice, necessitating the provincial agency chosen in the unification scheme be the superior court of each province. Thus it is submitted that in all family law matters within exclusive federal legislative competence Parliament, where it has not already done so, should confer jurisdiction on the provincial superior courts, while the provinces should do the same in respect of matters within their exclusive legislative competence.

Once jurisdiction in family law matters has all been conferred on the provincial superior courts, the question arises as to how all of these matters are to be dealt with in these courts. Obviously, the judges thereof would be overwhelmed unless they were able to delegate at least some of their new-found duties to subordinate judicial officers of their courts. In this connection, the constitutional limitations referred to above again dictate certain methods. It is submitted that

all federal legislation conferring family law jurisdiction on the provincial superior courts should authorize the judges thereof to delegate the exercise of such jurisdiction to subordinate judicial officers within their courts. This permissive legislation would pose no constitutional difficulties, since Parliament, it will be recalled, can confer jurisdiction on any agency it chooses.

With respect to the provinces, a problem does arise. They can authorize delegation by superior court judges to subordinate judicial officers of the exercise of some family law jurisdiction and should do so. There is, however, some jurisdiction which they cannot authorize delegation of, because it is jurisdiction which is normally exercised only by provincial superior court judges. Here, however, provinces are competent to authorize the superior court judges to make references to the subordinate judicial officers and to act upon their recommendations.⁽¹¹⁶⁾ This the provinces should also do. The important question at the provincial level is in which matters they may authorize a delegation of the power of final adjudication and in which they may merely authorize a reference.

There has been no judicial indication of family law matters within exclusive provincial legislative competence in which the provinces must confer at least the power of final adjudication on provincial superior court judges. The working paper on the family court prepared

by the Alberta Insitute of Law Research and Reform has suggested that the following matters be dealt with only by superior court judges in a unified family court: divorce, nullity of marriage, judicial separation, restitution of conjugal rights, loss of consortium, actions concerning matrimonial property, jactitation of marriage, declarations of status including declarations of legitimacy, guardianship of property. (117) Since some of these matters are within exclusive federal legislative competence and jurisdiction in respect of them could (and probably would) be conferred by Parliament, it is clear that this list cannot be taken to be a list of matters in which provincial superior court judges are compelled to make final adjudications, since Parliament could confer jurisdiction in respect of those matters within its exclusive legislative competence on other appointees if it chose. Nevertheless, for so many of these matters as are within exclusive provincial legislative competence this list may be taken as an appropriate guide to those matters in which provincial superior court judges could only be authorized by provincial legislation to make references to subordinate judicial officers, reserving to themselves the power of final adjudication.

If the scheme outlined above were adopted, all family law matters would henceforth be heard within the superior court of each province. The judges thereof would be able to delegate the power of final adjudication in all matters, except those in which jurisdiction has been conferred on them by the province and in which the jurisdiction broadly

conforms the type which they alone must exercise, to subordinate judicial officers. Even in respect of these matters the judges would be able to delegate to subordinate judicial officers the power to make recommendations. All of this delegation would, however, remain within the control of the superior court judges, allowing them, to shift so much of the new burden imposed upon them by the unification as they deem fit to the subordinate judicial officers.

THE IDEAL FAMILY COURT

The previous analysis has identified many weaknesses and defects in the existing judicial process insofar as it relates to the treatment and disposition of matrimonial and familial conflicts. The writer now intends to examine and evaluate recommendations and proposals for establishing specially constituted Family Courts with a comprehensive and integrated jurisdiction in all matrimonial and familial proceedings. For this purpose, it is first necessary to define the term "Family Court" with some precision.

Definition of "Family Court"

Advocates of the concept of a unified Family Court are in general agreement on the definition of the term "Family Court". Accordingly, it will suffice if this writer cites a limited but representative selection of definitions.

In a recent article advocating the concept of unified Family Courts, Fred Reagh concludes:

"To define 'Family Court' necessarily involves a more subjective approach since the term can have various meanings. For the purpose of this article it may be considered as a judicial tribunal empowered to deal with litigious matters of family law, but in so doing utilizes a restricted adversary system, presided over by specialized judges, supported by an expert staff of investigators, probation officers, caseworkers and psychiatrists. While it is admitted that any precise definition of a Family Court would not meet with universal approval, it is generally accepted that it is in the provision of diagnostic and therapeutic services that such a court is to be distinguished from all others." (118)

Similarly, P.J.E. Cole observes:

" Judge Alexander described his ideal family court as, 'one designed and equipped to protect and safeguard life in general and family units in particular by affording to the members thereof, in addition to their purely legal remedies, various other types of help; and by resolving all their justiciable problems and conflicts arising from their intra-familial relationships in a single integrated court, having one staff of specially skilled personnel, with one philosophy, one underlying purpose, working as one team, with one set of records, all in one place, under one direction, that of a specialist judge or judges.'

This plan was put into more concrete terms by the Standard Family Court Act of 1959, a product of the National Council on Crime and Delinquency. It proposed a court with the status and facilities of a court of general trial jurisdiction and forming a division of that court, with an integrated family jurisdiction, including the major matrimonial actions of divorce, separation and annulment, specialist judges, and a well trained auxiliary staff of counsellors and probation officers." (119)

And in the words of Lindsay G. Arthur, Administrative Judge of the Juvenile and Domestic Relations Division of the Fourth Judicial District Court of Minnesota:

" A true Family Court: (a) is a court of law; (b) encompasses all litigable areas of family trouble; (c) is under the control of a single and continuing judge; (d) deals with fact rather than jurisdictional pleadings; and (e) is supported by a competent staff. Based upon preliminary research it appears that only the court of Judge Paul Alexander, in Toledo, approaches all of these criteria." (120)

The concept of a unified Family Court was recently endorsed in a major research project undertaken in the Province of Newfoundland, wherein the ideal Family Court is defined in the following terms:

" Theoretically, a family court has comprehensive and integrated jurisdiction over all or almost all family problems, employs a professional staff of psychiatrists, psychologists, case workers, marriage counselors, probation officers and lawyers, and is committed to the philosophy that its function is to provide whatever action is in the best interest of the family and society. One should note that the court's staff can do what the judge and lawyer cannot do; they can go into the home and observe with a trained eye the interpersonal relationship between the child and other members of the family and can give their observations and expert opinions to the court with complete neutrality.

The object of the court is to conserve, not disserve family life --to be constructive, not destructive of marriage — to be helpful, not harmful, to the individual partners and their children — to be preventive rather than punitive of marriage and family failure. It is sociologically oriented, where possible, non-punitive, and it attempts to focus on the overall family problem." (121)

THE PHILOSOPHY AND ROLE OF FAMILY COURTS

A research study, which recommended the statutory creation of unified Family Courts in the State of Hawaii, has defined the philosophy of such courts in the following words:

" The essential philosophy of a family court is individualized justice. 'This in essence means that the court "recognizes the individuality of a child and adapts its orders accordingly", that it is a "legal tribunal where law and science, especially the science of medicine and those sciences which deal with human behavior, such as biology, sociology, and psychology, work side by side" and that its purpose is remedial and to a degree preventive, rather than punitive." : [Standards for Specialized Courts Dealing With Children, United States Children's Bureau, Washington, D.C., 1954, p. 1].

The Family Court Committee endorses this philosophy fully and further agrees with the following statement [ibid., p. 1]:

'In order for a court to become a fully effective and fair tribunal operating for the general welfare there must be:

1. A judge and staff identified with and capable of carrying out a non-punitive and individualized service.
2. Sufficient facilities available in the court and the community to insure:
 - (a) that the dispositions of the court are based on the best available knowledge of the needs of the child.
 - (b) that the child, if he needs care and treatment, receives these through facilities adapted to his needs and from persons properly qualified and empowered to give them.
 - (c) that the community receives adequate protection.
3. Procedures that are designed to insure that two objectives are kept constantly in mind, these being
 - (a) the individualization of the child and his situation and
 - (b) the protection of the legal and constitutional rights of both parents and child.'" (122)

The philosophy of individualized justice was legislatively endorsed in section 333-1 of the Family Court Act (Hawaii), 1965, which provides as follows:

" Sec. 333-1. Construction and purpose of chapter. This chapter shall be liberally construed to the end that families whose unity or well-being is threatened shall be assisted and protected, and restored if possible as secure units of law-abiding members; and that each child and minor coming within the jurisdiction of the court shall receive, preferably in his own home, the care, guidance, and control that will conduce to his welfare and the best interests of the State, and that when he is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which they should have given him." (123)

A similar philosophy has been legislatively endorsed in Canada with respect to the treatment and disposition of juvenile delinquents. Thus, section 38 of the Juvenile Delinquents Act, R.S.C., 1970, ch. J-3, provides:

" This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."

More general legislative guidelines as to the role of Family Courts, or, more specifically, Conciliation Courts, are set out in section 1730 of the California Code of Civil Procedure. Meyer Elkin accordingly observes:

" The purpose of the Conciliation Court is 'to protect the rights of children and to promote the public welfare by preserving promoting and protecting family life and the institution of matrimony, and to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies .' [C.C.P. 1730.] To attain this purpose, the Court's counseling staff helps husbands and wives who are in conflict with each other to develop a greater understanding of themselves, their role behavior, and their expectations in regard to the marital partner. Their improved understanding of role expectations and behavior can lead to a lessening of the marital conflict and a greater sensitivity on the part of each person to the emotional needs of the other." (124)

It should be emphasized that the aforementioned statutory provision does not define the purpose of the Conciliation Court in terms of preserving marriages at all costs. It presupposes that the matrimonial relationship may be incapable of preservation or rehabilitation but, in such circumstances, the professional counselling staff available to the court may contribute towards a constructive resolution of the issues and problems which inevitably confront the parties on dissolution or breakdown of the marriage. The dual role of the court and its professional staff to preserve the viable marriage and to promote amicable settlements and constructive resolution of the issues and problems arising consequentially on divorce or marriage breakdown are identified in the Report of the Governor's Commission on the Family, California, 1966, wherein it is stated:

" The direction of the law must be, as we have said, toward family stability—toward preventing divorce where it is not warranted, and toward reducing its harmful effects where it is necessary...

To paraphrase a recent study, if a marriage is viable, it is the job of the Court, through any available personnel, to afford the parties what help they need and the Court can give. If the marriage has irretrievably foundered, then it must be the goal of the Court to aid the litigants to respond as maturely as possible to the difficult experience of the divorce. If the procedure, by 'relieving tensions, or offering comfort or interpretation,' can enable the litigants to respond less hysterically or vindictively and more reasonably to the experience of divorce, the legal issues can be more intelligently and constructively analyzed by the Court and counsel, and the court may more easily develop final orders which will operate to the best interest of the parties—and children—involved." (125)

BIPARTITE STRUCTURE AND FUNCTION OF FAMILY COURTS

The above definitions of the concept and philosophy of the ideal Family Court indicate that the court has a bipartite structure and function. It has (i) an adjudicatory function to determine by judicial disposition any conflicting claims or issues between the parties which cannot be consensually resolved, and (ii) a social function to promote reconciliation, and where this is impossible or undesirable, to promote amicable and equitable settlement of issues arising consequentially on the breakdown of the matrimonial and familial relationship. (126)

The adjudicatory function becomes relevant only in cases where the therapeutic role assigned to the specialized counselling staff attached to or available to the court cannot totally resolve the inter-spousal or intra-familial issues. (127) In discharging the adjudicatory function,

the judge should have access to the expertise of the specialized support staff who may be of substantial assistance in undertaking relevant social investigations and preparing reports as required or requested by the court. As Dean Roscoe Pound has stated:

" From the lawyer's standpoint it is vital to have magistrates trained in law. From the standpoint of the social worker it is of no less importance that the determinations be arrived at with the advice and concurrence of persons well trained in and qualified for social service. Both of these points of view must be heeded. The judge must know what the court may do and how it may be done within the limits of the law. The social worker must take account of this. But the judge must be advised of what is best suited in the individual case to rehabilitate the actual or redirect the potential delinquent. They will work together best in a unified system rather than in separate and very likely mutually jealous and potentially hostile organizations." (128)

Effective inter-professional treatment and disposition of matrimonial and familial conflicts cannot be assured merely by legislation defining the structure and operation of Family Courts. The respective roles and responsibilities of the judge and of specialized support staff must not only be delineated but premised upon mutual understanding and respect. Thus, John J. Horwitz has observed:

" The problem at hand is the administration of a socialized court under enabling legislation making it responsible for treatment, yet identifying probation officers and mental health personnel (clinical psychologist, psychiatrist, social worker) as 'auxiliary'.

Clearly in such a setting, it is incumbent upon the judiciary to define with some clarity *both* its expectations of personnel in other disciplines *and* the measure of authority delegated to them in order that they may live up to their responsibilities. An economical and productive division of labour is unlikely to eventuate in a bureaucratic apparatus left unattended, to bear the imprint of whichever strong personality may happen to rise to the top. Simple fiat cannot make for competence in court officers whose preparation does not equip them for the demanding task of assessing social need in a multi-handicapped population. Nor does a pious pronouncement insure that subtle articulation of segmental expertise which makes for effective team operations.

A *sine qua non* surely, is some measure of mutual respect among *all* the members of a court's staff. A judge should have some understanding of a psychiatrist's *modus operandi*. And a social worker should have the patience with judicial process that grows out of a deep seated deference to the social values which underly the rule of law.

Effective employment of 'auxiliary' personnel must be based upon three propositions: 1) the judge must know enough about the processes of social study and social service to address relevant inquiries to his colleagues; 2) the colleagues must be encouraged to make spontaneous contributions of an advisory character; and 3) the nature of the responsibility specifically placed on the judge's shoulders, under the law, must be clearly understood and accepted by him as well as his colleagues.

To assess the validity of the radical assumptions upon which the structure of 'individualized justice' has been erected is to scrutinize the discretion, the ingenuity, and the employment of social values that characterize the conduct of the presiding judges." (129)

CHARACTERISTICS OF IDEAL FAMILY COURT

I. General

It is desirable to examine in some detail the specific characteristics and features of the ideal Family Court. Before so doing, a summary of the minimum needs essential to an effective court appears to be appropriate. In advocating the establishment of a Family Court in Hawaii, the Commission on Children and Youth stated the following opinion:

" An effective family court dealing with children and families would need; comprehensive jurisdiction, a full-time judge who can become a specialist, procedures which are relatively informal and directed toward determining the best disposition or adjustment of the family situation while protecting the interests of individual members, sufficient and competent probation and other social services; availability of medical, psychiatric and psychological services as required, adequate detention facilities and shelter care facilities for the temporary and emergency care of children awaiting disposition. In addition, such courts require the cooperation of other local and state agencies and the understanding and support of the general public." (130)

And in a realistic appraisal of the Family Courts presently operating in the United States, Elizabeth and Richard Dyson conclude:

" If a family court achieved none of its other goals, it would still constitute a significant reform if it succeeded in establishing continuity of contact between a given family and one court. Such continuity has been said to require housing the family court and its facilities in one central location, rather than requiring

litigants to cross town to reach different buildings for different family problems. It is usually agreed that judges should have lengthy appointments and should avoid rotation as much as possible, in order to foster the desired continuity. Institutional structures for pooling of knowledge and ideas about court clients should be established for all auxiliary personnel. Finally, perhaps most important of all, court records and studies on a given family ought to be centrally indexed, so that previously accumulated knowledge can be readily available and judicial dispositions arrived at in the light of prior dispositions." (131)

II. Court of Law

Family Courts must retain the character of courts of law in order to promote effective legal protection of the rights of all parties. The resolution of conflicting claims, where reconciliation or conciliation and settlement of disputed issues cannot be consensually achieved, requires an adjudicatory process which cannot be delegated to non-judicial officers. The Family Court should be developed as a court utilizing the techniques of the social services, and not a social service agency utilizing the authority of law. Such characterization of the Family Court has been endorsed by lawyers and legislatures and appears to meet with the general approval of other professions and of the public. The attitude of the lawyer is reflected in the following observations:

" The structure [advocated in the Standard Family Court Act (U.S.)] is designed to be a court, not a social agency, even though certain social services will be available and will be utilized within the judicial framework. These social services will be for the purpose of facilitating and implementing the judicial process so that the court, can render effective judicial service.

In our system of government, courts are primarily [responsible] for the protection of personal and property rights through the settlement of controversies. Litigants and prospective litigants and their representatives have the right to expect that all of our courts will function as courts with regard for a person's constitutional rights and in accord with principles of procedural law as well as substantive law. This does not diminish the importance of social studies and social reports as basic elements in the functioning of family courts. A sound investigatory procedure in connection with controversial issues of the judicial cases is of the utmost value, since what is best for the family as a whole must be considered without ignoring the rights and interests of family members and the protection of society." (132)

A similar attitude is typically manifested by legislatures and is exemplified in the Family Court Act (New York) 1962, in respect of which one commentator concludes:

" It must be clear from the discussion of administration and judicial traditions that the Family Court Act does not establish a social agency. It confers official powers on a court to intervene in the lives of others or to authorize others to do so. In accord with our traditions, it also prescribed substantive and procedural standards for the exercise of those delegated powers.

Thus the statute 'expresses a legislative determination to provide a due process of law' and 'affirms the traditional role of the court in reviewing under the constitution the application of the law'." (133)

Public opinion, which was canvassed by a Group appointed by the Archbishop of Canterbury to examine Divorce Law in Contemporary Society, would appear to be reflected in the following statement:

" The court must be a court of law, in that it should administer justice publicly and certainly in accordance with established principle and reported precedent. Nothing less would be compatible with the gravity of the issues within its jurisdiction, namely, questions of status, nullity, illegitimacy, the custody of children, the disposition of the property of the spouses.

... The procedure of the court must be flexible, so that spouses and children may be treated as individual persons, and in such a way as may not tend to estrange the parties from each other still further, jeopardize what chance of reconciliation may remain, or add to the sense of shame, indignity, and insecurity, felt by their children. The procedure must nevertheless be strict enough to protect the rights of all who may be affected by the court's decrees or orders, and to preserve public confidence in the administration of justice." (134)

III. Procedure

There is a strong lobby of opinion which suggests that the procedure of the Family Court should be primarily investigatory and non-

contentious. This thesis has been expounded by Dean Roscoe Pound in the following terms:

"There are four applications of the analogy of a proceeding in chancery rather than that of an action at law, which should govern in the family court procedure:

1. Instead of being wholly contentious the proceeding in the family court division should be investigatory directed to determining the best disposition or adjustment of the family situation as a whole and seeking a complete disposition thereof. It may involve contentious trial of certain issues of fact. But the proceeding as a whole should not be primarily and characteristically contentious.
2. The purpose should be to work out and seek to establish whatever plan is best for the family as a whole while not ignoring the interests of individual members.
3. All persons who will be affected by a complete disposition should be made parties to the proceeding and there should be a simple method of bringing parties into the proceeding as part thereof or dismissing them.
4. The court should have an adequate staff of well-trained assistants.

... Reorganization of the administrative work of the courts has made much progress in the present century...It should be carried out in the family court, and so carried out as to make full provision for dealing with cases in the organization of the family court division (as it may well be in the unified court) with the best of professional advice and assistance.

A family court made to the model set by the juvenile court as a court of equity may be relatively informal in its procedure...What is required is a simple investigatory procedure with contentious trial of issues of fact." (135)

Judge Alexander, a leading exponent of the concept of the unified Family Court, expressed similar conclusions in endorsing the procedure adopted in the Japanese Family Court. He stated:

"Our Japanese brethren have clearly sensed the contrast between the approaches of the old divorce court and new family court, and have expressed it so neatly and simply we can do no better than quote:

'In regular court procedure, whether criminal or civil, it is the aim of the Court to establish a certain fact which happened in the past and apply laws thereto, while, in the procedure of the Family Courts, whether it involves a family case or a juvenile, the Court attaches more importance upon how to maintain the peace and happiness of the family involved or how to adapt delinquents to normal social life than upon how to simply establish a past fact. For this reason, its procedure has the following characteristics:

- (1) The procedure is held informally, those concerned sitting around a table and the whole procedure is conducted in a very free and congenial atmosphere.
- (2) The procedure, being held in closed session, is not open to the public and the private affairs of the parties and other persons are kept strictly secret.

(3) The parties and other persons involved must personally appear in the court for this procedure. Most of the cases are handled without the intervention of attorneys.

(4) It emphasizes social investigations and physical and mental examinations rather than legal technicalities.'" (136)

The necessity of promoting informal, flexible, and investigatory rather than contentious. procedures as an integral feature of the Family Court is also affirmed in a recent report published by the Family Law Study undertaken in Newfoundland, wherein it is stated:

" Litigation involving family difficulties presents a social as well as a legal problem. A purely adversary approach to such matters is often not in the public interest and may be detrimental to the parties concerned, and in any event traditionally deals with symptoms only and not with basic causes. Such an approach multiplies the misunderstandings between partners and widens the gap. Routine legal and judicial procedures promote ill will and grind down self-respect. Instead of being wholly contentious, the proceeding in the family court should also be investigatory — directed to determining the best disposition or adjustment of the family situation as a whole and seeking a complete disposition thereof. A preventive or therapeutic approach rather than a recriminatory fault-finding technique is socially desirable.

The court procedure should be patterned after equity procedure. Flexibility should be a feature and the type of procedure employed should depend primarily upon the type of case and its disposition. For example, rules of evidence should be rigidly adhered to in contested divorce or contested juvenile delinquency cases. In any event parties concerned and their counsel should have an opportunity to see in advance the reports of court personnel so that there may be a refutation of any errors or inaccuracies. There are two important values at stake here — on the one hand, a family court, to be

effective, needs the information made available by reports and investigations, and on the other hand, to insure fairness and to elicit facts such investigations and reports should be subject to correction and review.

While in an investigatory procedure, there may be a need for some relaxation in the rules of evidence, it should be noted that the family court is still a judicial tribunal and hearsay evidence should be as foreign to it as it is to any court. The fact that family courts are geared to a system of individualized justice should not be used as a substitute for poor practice and procedures. There should be a recognized right to counsel for all persons coming before the family court. A lawyer attached to the court may insure observance of this right.

Because of the nature of matters coming before the family court, some thought should be given to removing the traditional husband-wife privilege — and making this privilege one of husband and wives as witnesses rather than as parties.

... Proceedings on behalf of families in family court are non-criminal in nature and the court must be permitted to operate with a degree of flexibility consistent with the protection of the rights of individuals coming before it. Failure to permit this would negate the basic principles underlying the philosophy of these courts." (137)

Although there appears to be a consensus of opinion that the procedure in the Family Court should be as informal and flexible as circumstances will allow, it is consistently emphasized that informal procedures must not undermine the dignity and authority of the court and that non-compliance with procedural and statutory requirements cannot be counter-nanced. Thus, Professor Murray Fraser has stated:

" Perhaps because few counsel appeared in the early stages of the development of the family courts, informality during the proceedings has been carried too far. An effort must be made to strike a proper balance between the dignity of a court of law on the one hand, and the somewhat relaxed atmosphere which is necessary to discover the root of the problem confronting the court, on the other hand." (138)

And, in a study of the state-wide system of Family Courts operating in New York, Rhode Island and Hawaii, Elizabeth and Richard Dyson have observed:

" The family courts under study all carry on the practice, long associated with the juvenile court, of conducting children's hearings in an informal way. All the family court acts except Rhode Island's specifically sanction such informality. Thus Hawaii's family court judges seldom wear robes, and referees in the first circuit dress in ordinary business attire; referee hearings are conducted in small conference-sized rooms without elevated benches. In New York '[c]ounsel coming into the Family Court..may be surprised, if not dismayed, by the lack of courtroom formality. The judge, not wearing a robe, may be sitting behind an ordinary conference table...The proceedings may be conducted in what appears to be a purely conversational manner..'. In Rhode Island courtrooms with elevated benches are used for hearings, but the judges dress in ordinary business attire.

The very informality of the hearing may well tempt the trier of fact to slur over certain procedural requirements imposed by the governing family court act. This has sometimes happened in New York, where appellate courts have had to reverse family court decisions on the ground that certain statutory procedures were not observed. The courts have indicated that the informality of the family court cannot be permitted to justify slurring over statutory requirements and that more than pro forma compliance is required." (139)

Corresponding emphasis on the need to promote informal procedures that are consistent with the proper administration of justice also appears in a study of Family Courts in Canada which was undertaken by the Canadian Corrections Association and the Canadian Welfare Council. It is therein stated:

" There should be informality but not incorrectness in the procedure of the family court. The preliminary interviews and investigations should be conducted completely informally with the aim of helping to solve the difficulties in which individuals find themselves. In the courtroom, the dignity of the court should be maintained, and correct legal procedure must prevail with respect to evidence, but the general tone should be sympathetic. The same atmosphere should prevail in family court as that set forth in the Juvenile Delinquents Act, [now R.S.C., 1970, ch. J-3 section 17(1)]:

'Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances will permit, consistent with a due regard for a proper administration of justice.'" (140)

Implicit in the conclusion that a proper balance must be maintained between informed and flexible procedures and the proper administration of justice is the premise that informal procedures must not impinge upon the legal and civil rights of the affected parties. Recent years have evidenced a resurgence of the demand that the parties be assured due process of law whether the court is administering civil or criminal justice. This is underlined in the recent decision of the United States Supreme Court in Re Gault⁽¹⁴¹⁾ and is manifested in the Report

of the Royal Commission Inquiry Into Civil Rights, wherein it is observed:

" The purposes and functions of the juvenile and family court are quite different from those of ordinary courts of justice. The rigid procedural requirements of the ordinary courts would in some measure frustrate the social purposes of juvenile and family court. In seeking to accomplish its social purposes, the court must not overlook the protection of essential civil rights. The adversary system has shortcomings as an instrument to produce the best results in juvenile courts, but the legal safeguards which are assured in a good adversary system are not to be diminished.

... Proceedings in the juvenile and family court relate to jurisdiction over five main categories of trial:

- (1) Trials of young persons;
- (2) Trials of adults for offences in respect of young persons;
- (3) Trials of adults for criminal offences in which young persons may or may not be involved, e.g., section 186 [now section 197] of the Criminal Code;
- (4) Trials of civil matters involving young persons, e.g., maintenance and custody;
- (5) Trials of civil matters in which young persons may or may not be involved, e.g., maintenance of a wife.

These may be subdivided, but for our purposes they are sufficient to demonstrate that all the jurisdiction exercised in the juvenile and family courts cannot be properly exercised under the same rules or procedure. The trial of juveniles is less than one-third of the work of these courts. The procedure in these cases is quite different from that which should be applied in other cases. Strict adherence to the procedure of the ordinary courts might well work to the detriment of the child. The function of the judge is not so much to determine guilt as to find out the underlying causes which have brought the child before the court, and when these have been determined to prescribe treatment. He is a social physician

charged with diagnosing the case and issuing the prescription. This function cannot be properly performed if he is surrounded by too many legalistic trappings; nevertheless, there must be some basic ones.

On the other hand, where children are not being tried, the fundamental procedures of the courts designed to protect civil rights should prevail, but there should be some emphasis on social objectives that cannot be imported into the ordinary courts. It is most difficult to lay down specific rules for these courts which would adequately protect the civil rights of those appearing before them, without unduly limiting the courts' social functions.

The Committee appointed by the Federal Government in 1961 to consider the problem of juvenile delinquency in Canada, and to 'make recommendations concerning steps that might be taken by the Parliament of Canada to meet the problem of juvenile delinquency in Canada', was unable to be more specific on procedure than to recommend that 'appropriate steps should be taken to provide more adequate guidance to juvenile court judges on matters of procedure than they now receive'. The rule of thumb of the individual judge is not sufficient.

We recommend that a procedural Rules Committee be established to make general rules of procedure to be followed by juvenile and family court judges in all matters coming within the provincial jurisdiction, and to confer with the proper federal authorities with a view to establishing suitable rules concerning those matters that are exclusively within the federal jurisdiction. It is not suggested that rigid rules be evolved which would place undue restriction on the attainment of the social objectives of these courts, but any social philosophy that excludes adequate protection of civil rights is a dangerous one....

The Rules Committee for the juvenile and family courts should be so constituted as to have adequate representation from the judges of those courts, those engaged in different

aspects of social work in connection with the courts, the legal profession and the public.

The rules should not be the same for the trial of juveniles as for the determination of the responsibility for the maintenance of or of the paternity of children. It should be a matter for the Committee to sort out the many powers exercised by juvenile and family court judges and to provide procedural guidance for them and adequate safeguards for the rights of individuals, applying the principles set out elsewhere in this Report. Juveniles, parents, husbands, wives, putative parents and those making claims against putative parents, all have civil rights to be protected. To dispense justice according to law is a function of the juvenile and family court, just as it is of any other court." (142)

Certain guidelines as to legislation or rules of court that might be introduced in Canadian jurisdictions to promote a proper balance between informal procedures and due process of law may be found in legislation enacted in the United States. For example section 333-19 of the Family Court Act in the State of Hawaii⁽¹⁴³⁾ expressly provides for hearings involving children and minors to be conducted informally but confers certain specific legal safeguards to ensure that such children and minors shall receive due protection under the law. Section 333-19 reads as follows:

" Sec.333-19. Procedure in children's and minors' cases. Cases of children and minors in proceedings under subsections (a) and (b) of section 333-8 shall be heard by the court separate from hearings of adult cases and without a jury. Stenographic notes or mechanical recordings shall be required as in other civil cases in the circuit courts, unless the parties waive the right of such record or the court so orders. The hearings may be conducted in an informal manner and may be adjourned from time to time. The general public shall be excluded and only such persons admitted whose presence is requested by the parent or guardian or as the judge or referee shall find to have a direct interest in the case or in the work of the court from the standpoint of the best interests of the child or minor involved. Prior to the start of a hearing, the parents, guardian, legal custodian, and when appropriate, the minor shall be notified of the right to be represented by counsel.

Findings of fact by the judge or referee of the validity of the allegations in the petition shall be based upon a preponderance of evidence admissible under the rules applicable to the trial of civil causes, provided, that no minor who is before the court under the provisions of subsection (a) of section 333-8 shall be required to testify against himself over the objection of his parents, guardian or counsel. In the discretion of the judge or referee the child may be excluded from the hearing at any time. When more than one minor is alleged to have been involved in the same act, the hearing may be held jointly for the purpose of making a finding as to the allegations in the petition and they shall be heard separately for the purpose of disposition except in cases where the minors involved have one common parent.

In the disposition part of the hearing any relevant and material information, including that contained in a written report, study or examination, shall be admissible, and may be relied upon to the extent of its probative value; provided, that the maker of such a written report, or examination shall be subject to both direct and

cross-examination upon demand and when he is reasonably available. The disposition shall be based only upon the admitted evidence, and findings adverse to the minor as to disputed issues of fact shall be based upon a preponderance of such evidence.

Upon a final adverse disposition, if the parent or guardian is without counsel the court shall inform the parent or guardian of his right to appeal as provided for in section 333-28.

The court may by rule establish appropriate special procedures for the hearing and disposition of cases involving violation of traffic laws or ordinances by children or minors." (144)

Canadian concern about the need to promote informal procedures which are consistent with due process of law and a proper administration of justice has become increasingly evident in recent years. Perhaps in response to the recommendations of the Royal Commission Inquiry Into Civil Rights,⁽¹⁴⁵⁾ the Rules Committee of the Provincial Court (Family Division) for the Province of Ontario has formulated draft legislation and procedural rules in this context which have been afforded wide circulation in order to promote a constructive response.⁽¹⁴⁶⁾

IV. Pleadings

The procedure of any court is in large part determined by the character of the pleadings and the attitude of the court thereon. If effective informal and flexible procedures are to operate not only in an attempt to resolve the issues without recourse to litigation but also in any judicial hearing of the dispute, it will be necessary

to devise pleadings that are consistent with and promote such procedures.

Dean Roscoe Pound has stated:

"A system of courts devised to deal with the typical single issue required by the system of formulating an issue in pleadings, reducing the controversy by a series of successive formal arguments to a fact asserted by the one and denied by the other, is not adequate to the troubles of a family in the complex society and manifold, diversified and complicated activities of today." (147)

It has been contended that, if the role of the court is to ascertain and constructively resolve the basic problems underlying matrimonial and familial conflicts, the inhibiting character of pleadings which define legal issues rather than the underlying social or interpersonal problems must be eliminated. Thus Lindsay G. Arthur, Administrative Judge of the Juvenile and Domestic Relations Divisions of the Fourth Judicial District Court of Minnesota has observed:

" It is reasonably easy to consolidate jurisdiction so that one judge hears all cases affecting the family. Although this promotes consistency, it is insufficient, since in each case the judge is limited to the remedies of that particular case. In a divorce case, he cannot send a child to a correctional institution even though the need may be obvious. In a neglect case, he cannot allocate the family's income between husband and wife. In a delinquency case he cannot grant a separation or divorce, however desired or indicated. More than merely consolidating all the reins in one hand, there is need for a single rein, for fact pleadings, for posing to the court the problems of the family rather than the jurisdictional grounds with the consequent jurisdictional limitations. Thus, provision should be made for a departure from

the present method of pleading by which only the superficial symptoms are brought before the court: that a child stole a car, that the husband was cruel, that the wife drank excessively. Instead, pleading should be based on a child's need for control or care, or on the family's need for remedies for an estrangement, or the family members' need for an allocation of the family's income. Fact pleading which would go to the root causes and needs of the family's problems would permit the court to go to the root causes and seek a solution to the family's problems." (148)

Such an ambitious and radical proposal for fundamental change in the character and method of pleading, which would enable the court to exercise a plenary and unfettered jurisdiction over all issues affecting the family, would appear impracticable insofar as the proposals are premised on the tacit, but, it is submitted, erroneous assumption that the basic causes of matrimonial and familial conflicts can be readily identified in all cases. (149) The proposal also endangers the general principle that all affected parties are entitled to precise information on the issues to be litigated in order that they may have the opportunity to present submissions to the court on all relevant issues. The proposal of Judge Lindsay G. Arthur accordingly constitutes a counsel of perfection and idealism that defies effective implementation.

It may be relevant to observe that, in formulating standards for Juvenile and Family Courts, the United States Department of Health, Education and Welfare expressly rejected the notion that the jurisdiction of the court should be totally unfettered by the pleadings. The following statements appear in the report:

" Civil cases affecting adults should be in accordance with established civil procedures and disposition should be limited to the issue set forth in the petition.

A child should not be subject to the jurisdiction of the court because his parent is involved in a petition for support, or because paternity proceedings have been entered on his behalf. If, in the course of a civil case, it should appear that the child is neglected, or that the parent should be charged with a criminal offense, the judge should refer the matter to the proper authorities for investigation and the possible filing of the necessary petition or charges." (150)

" Where a specific issue (such as adoption, contested legal custody, the appointment of a guardian of the person, or nonsupport) rather than an act of or the condition of a child is before the court, the court should confine itself to the issue in question. It should not, for instance, be able to detain a child, or vest legal custody over the child in an agency, when the court's powers have been invoked to accomplish a limited purpose, and there is no allegation that the child is delinquent or neglected. The petition, however, may be amended with the consent of parties.

Should the court believe that neglect is also involved, it may refer the situation to the proper authorities for investigation and for the possible filing of a petition which would bring the child properly before the court. There is one situation in which the court should require the filing of a specific petition. This is where it is apparent that there is no one to act as the guardian of the person of the child because of the death, desertion, or unavailability of both his parents. The rights of a child to have someone legally responsible for his welfare is so basic that the court should never allow a situation to continue in the case of a child coming before it in which there is

no effective natural or legal guardianship of the person, nor should the fact that the child is not physically neglected or is being care for by persons who are fond of him obscure this basic right.

The general rule that a court's actions must be confined to the issue at stake should not prohibit interim action in the instance of a child who is the subject of a custody case when it is apparent that the contestant having the actual physical care of the child may attempt to influence the child's testimony, or remove him from the jurisdictional area of the court before a decision can be made. The court should have the power to order the child placed temporarily in a shelter-care facility or in a neutral situation with relatives until a decision is rendered."(151)

Although there appear to be valid objections against conferring a plenary jurisdiction on the Family Court to enable any issue to be resolved irrespective of the pleadings, the difficulties and defects inherent in the present system might conceivably be mitigated, if not eliminated, by a general statutory provision or rule of court which authorized the court to order an amendment of the pleadings or a joinder of third parties where such a course of action seemed desirable and met with the consent of all affected parties. This more practical solution to the problem of fragmented proceedings has been endorsed in section 333-21 of the Family Court Act (Hawaii), 1965, which provides as follows:

" Sec. 333-21. Additional remedies not pleaded. When it appears, during the course of any trial, hearing, or proceeding, that some action or remedy other than or in addition to those indicated by the petition or other pleadings appears appropriate, the court may, provided all necessary parties consent, proceed to hear and determine forthwith the additional or other issues as though originally properly sought and pleaded." (152)

Furthermore, if the offence concept which dominates divorce and matrimonial proceedings were to be eliminated, the opportunity might be taken to introduce a system of neutral pleadings corresponding to that advocated in the Report of the Governor's Commission on The Family, California 1966. Commenting on the recommendations therein set out, Richard C. Dinkelspiel and Aidan R. Gough have observed:

" To minimize the conflict and rancour between the parties, and to permit the Family Court to focus its inquiry upon the real problems of the marriage, the Commission recommends a system of neutral pleading by petition, captioned 'In re the marriage of A and B,' which would be substituted for the present antagonistic scheme of adversary pleading. To be termed the 'petition of inquiry,' this petition would simply request the court to inquire into the continuation of the marriage and would confer upon the court plenary jurisdiction to dispose of all facets of the matter before it. Such non-accusatory pleading will materially reduce the acerbity and bitterness of the parties' relations by eliminating the need for them to assume a formal adversary posture at the outset of the judicial process. It will avoid committing the spouses to the roles in which they are cast by formal fault grounds set out and tried by complaint and answer.

The Commission recommends that, following the filing of a petition of inquiry, there should be held in each case an initial evaluative interview or interviews with the professional staff, for the purpose of helping the parties to assess and understand their situation. This is not, it must be emphasized, an attempt to force conciliation upon the parties. Rather, it is to accomplish three things: first, to afford an opportunity to 'sound out' the parties regarding conciliation, and to provide such services where indicated; second, where conciliation is not workable

and severance is necessary, to assist the parties in resolving insofar as possible these points which remain as disputed issues; and third, to provide systematic means for the collection of data about the real underlying causes of marriage failure.

At the termination of the initial evaluation, the counselor would inform the court as to the possibilities of reconciliation in the particular case. If the parties decide that further counseling might be of benefit, they could continue either with the professional staff of the court or with qualified individuals or agencies in the community. If the parties conclude that reconciliation is not feasible, the services of the professional staff would be available to assist them and their attorneys in working out problems of child custody, support and the division of property, if these matters have not been agreed upon.

At the conclusion of the counseling process, but in any event no later than one hundred twenty days after the initial interview, the counselor would file with the court a written report--to be prepared only after consultation with the attorneys for each party--setting forth the circumstances of the parties and the matters as to which they have reached an accord and the counselor's opinions as to the viability of the marriage." (153)

The recommendations of the Governor's Commission on the Family, which relate to the neutrality of pleadings, were legislatively implemented in the Family Law Act (California), 1969. Thus, sections 4503 and 4509 of the California Civil Code, which now regulate proceedings for divorce, annulment and legal separation, provide as follows:

" CC 4503. Form of Petition and Summons. A proceeding for dissolution of the marriage or for legal separation shall be commenced by filing in the superior court a petition entitled 'In re the marriage of.....and.....' which shall state whether it is a petition for the dissolution of the marriage or a legal

separation. A copy of the petition together with a copy of a summons in form and content approved by the Judicial Council shall be served upon the other party to the marriage in the same manner as service of papers in civil actions generally.

CC 4509. Inadmissibility of Specific Misconduct Evidence--Exceptions. In any pleadings or proceedings for legal separation or dissolution of marriage under this part, including dispositions and discovery proceedings, evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is in issue and such evidence is relevant to that issue, or at the hearing where it is determined by the court to be necessary to establish the existence of irreconcilable differences."

Coupled with such neutral pleadings in divorce, annulment and separation proceedings is a statutory procedure whereby either spouse may file a petition for the purpose of preserving the marriage or promoting the amicable settlement of inter-spousal disputes. This procedure is regulated by sections 1761, 1769, and 1770 of the California Code of Civil Procedure, which provide as follows:

" CCP 1761. Petition for Conciliation Proceedings. Prior to the filing of any proceeding for dissolution of marriage, legal separation, or judgment of nullity of a voidable marriage, either spouse, or both spouses, may file in the conciliation court a petition invoking the jurisdiction of the court for the purpose of preserving the marriage by effecting a reconciliation between the parties, or for amicable settlement of the controversy between the spouses, so as to avoid further litigation over the issue involved.

CCP 1769. Court Orders At or After Hearing of Petition. (a) At or after hearing, the court may make such orders in respect to the conduct of the spouses and the subject matter of the controversy as the court deems necessary to preserve the marriage or to implement the reconciliation of the spouses, but in no event shall such orders be effective for more than 30 days from the hearing of the petition, unless the parties mutually consent to a continuation of such time. (b) Any reconciliation agreement between the parties may be reduced to writing and, with the consent of the parties, a court order may be made requiring the parties to comply fully therewith. (c) During the pendency of any proceedings under this chapter, the superior court may order the husband or wife, or father or mother, as the case may be, to pay any amount that is necessary for the support and maintenance of the wife or husband and for the support, maintenance, and education of the children, as the case may be. An order made pursuant to this subdivision shall not prejudice the rights of the parties or children with respect to any subsequent order which may be made. Any such order may be modified or revoked at any time except as to any amount that may have accrued prior to the date of filing of the notice of motion or order to show cause to modify or revoke.

CCP 1770. Filing Termination Petition Not Permitted for 30 Days After Conciliation Hearing. During a period beginning upon the filing of the petition for conciliation and continuing until 30 days after the hearing of the petition for conciliation, neither spouse shall file any petition for dissolution of marriage, legal separation, or judgment of nullity of a voidable marriage.

If, however, after the expiration of such period, the controversy between the spouses has not been terminated, either spouse may institute proceedings for dissolution of marriage, legal separation, or judgment of a nullity of a voidable marriage. The pendency of a proceeding for dissolution of marriage, legal separation, or declaration of nullity shall not operate as a bar to the institution of proceedings for conciliation under this chapter." (154)

The above analysis will have indicated that the Family Court must not be unduly fettered by formal or restrictive pleadings. Some relaxation in the present character of pleadings is necessary in order to promote informal procedures which are consistent with due observance of the legal rights of the parties to receive adequate notice and with a constructive resolution of all of the issues affecting the parties. There must also be some degree of flexibility so as to permit effective and efficient disposition of the many varied issues which may arise for determination by the court. The pleadings must be sufficiently explicit to enable the parties to present relevant submissions to the court but complexity should be avoided unless the circumstances are such as preclude a simplified form of pleadings. The pleadings must be sufficiently precise to enable the court to determine the issues without undue expenditure of time and effort. Informal procedures directed at promoting reconciliation or the amicable settlement of disputes with the aid of the counselling staff available to the court should not be dependent upon the submission of formal pleadings, although there may be some advantage in adopting the procedure existing in California, whereby the parties may file a petition for conciliation.⁽¹⁵⁵⁾ It is imperative, however, to differentiate between such informal procedures and the pleadings and procedures to be followed at a judicial hearing of disputed issues. It is submitted that fundamental changes in the form and method of pleading, which would encompass the requisite degree of flexibility and reduce or

eliminate the incidence of fragmented jurisdiction and unduly legalistic formulae, could be most effectively achieved by statutory provisions or rules of court requiring the mandatory use of standard form documents. Such a scheme would have the additional advantage of enabling the parties to appear in person before the Family Court in circumstances where legal representation is unnecessary or unavailable. Legislative approval was extended to such scheme by section 214 of the Family Court Act (New York), 1962, which provides as follows:

"214. Rules of court prescribing forms. Rules of court may prescribe such forms as may be proper for the efficient and just administration of this act, including forms for petitions, summons, warrants subpoenas, undertakings, and orders authorized by this act."

Commenting upon this section, Elloe D. Oughterson, Confidential Law Clerk of the Family Court, Erie County, has observed:

" Attorneys appearing before the Family Court will find that their functions in the preparation of petitions, moving papers, supplementary materials and orders have been severely circumscribed. The court, state-wide, has developed some one hundred thirty-five forms and plans more for use in the various matters within the jurisdiction of the court. They are in many respects quite similar and serve the use of the court where attorneys do not appear. However, fewer forms of a more general nature would actually prevent the anomaly of discovering that these forms are in their very number too limited. Where they have not been printed or are not available, counsel must prepare appropriate papers subject to the usual powers of the court to review them and require amendments; in any case, attorneys may conform to the Rules by using the forms as a basis for their own papers." (156)

V. Publicity: private hearings; confidentiality of court records

The advocates of unified Family Courts are in general agreement that legislative restrictions are essential in order to avoid undue publicity and to promote private hearings and confidentiality of court records.

There is presently a proliferation of Canadian statutes, both federal and provincial, which regulate these matters. Legislative restrictions applying to the trial of alleged juvenile delinquents are imposed by sections 12, 24 and 28(2) of the Juvenile Delinquents Act, R.S.C., 1970, ch. J-3, which provide as follows:

"12.(1) The trials of children shall take place without publicity and separately and apart from the trials of other accused persons and at suitable times to be designated and appointed for that purpose.

(2) Such trials may be held in the private office of the judge or in some other private room in the court house or municipal building, or in the detention home, or if no such room or place is available, then in the ordinary court room, but when held in the ordinary court room an interval of half an hour shall be allowed to elapse between the close of the trial or examination of any adult and the beginning of the trial of a child.

(3) No report of a delinquency committed or said to have been committed, by a child, or of the trial or other disposition of a charge against a child, or of a charge against an adult brought in the juvenile court under section 33 or under section 35, in which the name of the child or of the child's parent or guardian or of any school or institution that the child is alleged to have been an inmate is disclosed, or in which the identity of the child is otherwise indicated, shall without the special leave of the court, be published in any newspaper or other publication.

(4) Subsection (3) applies to all news papers and other publications published anywhere in Canada, whether or not this Act is otherwise in force in the place of publication.

24. (1) No child, other than an infant in arms, shall be permitted to be present in court during the trial of any person charged with an offence or during any proceedings preliminary thereto, and if so present the child shall be ordered to be removed unless he is the person charged with the alleged offence, or unless the child's presence is required, as a witness or otherwise, for the purpose of justice.

(2) This section does not apply to messengers, clerks and other persons required to attend at any court for the purposes connected with their employment.

28. (2) Representatives of the juvenile court committee who are members of that committee, may be present at any session of the juvenile court."

Supplementary federal legislative provisions regulating criminal proceedings involving children under sixteen and young persons over sixteen years of age are included in sections 441 and 442 of the Criminal Code, R.S.C. , 1970, ch. C-34, which provide:

" 441. Where an accused is or appears to be under the age of sixteen years, his trial shall take place without publicity, whether he is charged alone or jointly with another person.

442. The trial of an accused...who is or appears to be sixteen years of age or more shall be held in open court, but where the court, judge, justice or magistrate, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room, he may so order."

Restrictions upon the publications of reports of judicial proceedings and more particularly proceedings for divorce, nullity, judicial separation and restitution of conjugal rights are imposed by section 162 of the Criminal Code, which provides:

"162.(1) A proprietor, editor, master printer or publisher commits an offence who prints or publishes

(a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals;

(b) in relation to any judicial proceedings for dissolution of marriage, nullity of marriage, judicial separation or restitution of conjugal rights, any particulars other than

- (i) the names, addresses and occupations of the parties and witnesses,
- (ii) a concise statement of the charges, defences and counter-charges in support of which evidence has been given,
- (iii) submissions on a point of law arising in the course of the proceedings, and the decision of the court in connection therewith, and
- (iv) the summing up of the judge, the finding of the jury and the judgment of the court and the observations that are made by the judge in giving judgement.

(2) Nothing in paragraph (1) (b) affects the operation of paragraph (1)(a).

(3) No proceedings for an offence under this section shall be commenced without the consent of the Attorney General.

(4) This section does not apply to a person who

(a) prints or publishes any matter for use in connection with any judicial proceedings or communicates it to persons who are concerned in the proceedings;

(b) prints or publishes a notice or report pursuant to directions of a court; or

(c) prints or publishes any matter

(i) in a volume or part of a bona fide series of law reports that does not form part of any other publication and consists solely of reports of proceedings in courts of law, or

(ii) in a publication of a technical character that is bona fide intended for circulation among members of the legal or medical profession." (157)

Although it would appear unnecessary to catalogue all provincial statutory provisions that are directed at promoting privacy and avoiding undue publicity in matrimonial, familial and juvenile proceedings, it may be appropriate to examine the legislation in one jurisdiction to illustrate the ambit of provincial legislation. In Alberta, four provincial statutes provide piecemeal regulation of certain specific types of proceedings. Section 30(1) of the Domestic Relations Act, R.S.A., 1970, ch. 113, which applies to proceedings wherein protection orders are sought to secure maintenance for the deserted wife or children, provides:

" 30. (1) In the discretion of the magistrate cases arising under this Part may be heard in camera."

This section may constitute the basis of the more general provision in section 11 of the Family Court Act, R.S.A., 1970, ch.133, which provides:

" 11. Any case arising under this Act may, in the discretion of the judge, be heard in private." (158)

Supplementary legislative provisions regulating the disclosure of information and the nature of proceedings are set out in sections 13 and 20 of the Child Welfare Act, R.S.A., 1970, ch. 45:

" 13.(1) In the public interest, any file, document or paper kept by any person in any place

- (a) that deals with the personal history or record of a child or an adult, and
- (b) that has come into existence through anything done under or pursuant to this Act,

shall not be disclosed to any person except upon the written consent of the Minister.

(2) No person shall disclose or be compelled to disclose any information obtained by him in the course of the performance of any duties under this Act

- (a) except at a trial, hearing or proceeding under this Act, and
- (b) in any other case, except upon the written consent of the Minister.

(3) Subsections (1) and (2) do not apply to a disclosure specifically authorized to be made by or under this Act or The Vital Statistics Act, or to a disclosure

- (a) to any employee of the Department or of any other department or agency of the Government, or
- (b) to any official of a municipal government or of the Government of Canada or of any province or territory of Canada, or an agency thereof, or
- (c) to any person assisting or acting as an agent of the Department,

or to a solicitor acting on behalf of any of them, where the disclosure is made to enable the giving of assistance and information required for the proper administration of this Act.

(4) No person shall publish in any form or by any means

- (a) the name of a child or his parent concerned in any judicial proceedings under this Act, or
- (b) an account of the circumstances brought out at such a judicial proceeding.

(5) Nothing in this section prohibits the Director from publishing notice of hearings or other notices as may be necessary in the interests of justice or for the proper administration of this Act.

(6) A person who contravenes this section is guilty of an offence and liable upon summary conviction to a fine of not more than one hundred dollars and in default of payment to a term of imprisonment of not more than three months.

20.(1) Proceedings under [Part II] with respect to a child, including the investigation, hearing and disposition of the case, may be as informal as the circumstances will permit, having due regard to the best interests of the child.

(2) A hearing by a judge of the juvenile court with respect to a child

- (a) shall, where practicable, be held in premises other than ordinary police court premises, or
- (b) where that is not practicable, shall be held in the private office of the judge, if he has one, or if not, in some other room in a municipal building,

but if no other place is available, the hearing may be held in an ordinary police court only on the conditions that

- (c) the hearing does not commence until one hour after any preceding trial or examination in the court room has ended, and
- (d) no other trial or examination is held in the court room until after the hearing has ended and all persons having an interest in the hearing have left or have been removed from the court room.

(3) A judge shall exclude from the courtroom where a hearing is being held all persons other than the counsel, any officer of the law, and any child welfare worker connected with the case, the Director or his representative and the parent or guardian of the child or the immediate relatives of the child concerning whom the hearing is being held and such other persons as the judge in his discretion permits.

(4) Where the judge considers it desirable, he may exclude from the room where a hearing is being held the child concerning whom the hearing is being held and the parent or guardian of the child and the immediate relatives of the child."

Additional restrictions on the publication of documents in civil proceedings generally and on the publication of reports respecting judicial proceedings involving marriage and divorce are imposed pursuant to the Reports of Judicial Proceedings Acts, R.S.A., 1970, ch. 320.

The practice followed by the Juvenile and Family Courts in Alberta is to hold private hearings not only in cases involving alleged juvenile delinquency but also in inter-spousal and inter-familial proceedings where the legislation confers a discretion on the court so to do. The judges may and frequently do, however, admit persons who are interested in the procedure of the court, after advising such persons of the confidentiality of the proceeding.

It will be observed that the federal and provincial statutory provisions do not provide a comprehensive restriction affecting all matrimonial, familial and juvenile proceedings. Such piecemeal legislation fails to promote any uniform policy or practice and requires review and revision regardless of whether a comprehensive and integrated jurisdiction is vested in specially constituted Family Courts. Furthermore, the existing legislation lacks the requisite degree of precision and certainty. There are, for example, no explicit restrictions respecting the hearing of appeals in proceedings encompassed by the federal and provincial legislation.⁽¹⁵⁹⁾ Other inherent defects and uncertainties have been exposed in judicial decisions.⁽¹⁶⁰⁾ The arguments in favour of promoting privacy of hearings and avoiding undue publicity in cases involving charges of juvenile delinquency, the uncertainty arising in the interpretation to be accorded to section 12 of the Juvenile Delinquents Act, and the need for clarification and amendment have been analyzed in some detail in the Report of the Department of Justice on Juvenile Delinquency in Canada. It is therein stated:

" From time to time suggestions are made that the trials of juveniles should take place in public or that publicity should be given to the names of juvenile offenders and details of their offences. Such proposals are advanced for two quite different reasons. Some persons argue that the fear engendered by public notoriety will serve as a deterrent to the juvenile offender or will make parents more anxious to exert control over their delinquency-prone youngsters. Other persons are concerned about the traditional right to an open and public trial as a guarantee that fair procedures are being followed. We recognize the importance of guarding against abuses in juvenile court proceedings and make a number of suggestions in our Report for dealing with this problem. We affirm, however, the basic philosophy expressed in section 12 of the Act that publicity in regard to the juvenile offender is to be avoided. In support of this position we can do no better than quote the following observations made by Professor Mannheim:

'The fullest publicity for every criminal trial has been one of the basic safeguards of enlightened criminal justice...On the other hand, it has been recognized ever since the establishment of Juvenile Courts that this great principle is not equally suitable for the trial of juveniles. In the first place, the danger of political and social bias which publicity of the trial is intended to guard against does not to the same extent exist in cases of juveniles. Secondly,it is obvious that the benefits of publicity, great as they may be, would here be bought at too great a price. If the stigma... which is the almost inevitable consequence of a public trial is often an undeservedly severe penalty even for the adult offender, in the case of the juvenile delinquent it would mean the most flagrant negation of all those ideals the Juvenile

Court stands for. Moreover, the force of imitation being particularly strong in the immature mind, more juveniles are likely to be encouraged than might be deterred by publicizing their own criminal exploits or those of their contemporaries. Juvenile Court Acts everywhere have, therefore, in one way or another restricted the publicity of trial of juveniles...'. .

Under the Act the ban on identification of the child is addressed to 'newspapers and other publications'. Doubt has been expressed as to whether this prohibition extends to radio and television. These doubts should be removed and the legislation should indicate clearly that identification of a child through any media whatsoever is prohibited without special leave of the court. We think that the prohibition against identification of a child should extend to any criminal proceedings involving a child where the proceedings arise out of an offence against, or conduct contrary to, decency or morality. This prohibition should apply whether the proceedings are before the juvenile court or an adult court. The young girl ten years of age who is sexually assaulted should not be subjected to the indignity of gross publicity. We would expect that in any such case the mass media would take care not to identify the child. We recommend, however, that they be prohibited from doing so if they be so inclined.

Closely related to the question of publicity is the matter of private hearings. One of the purposes of private hearings is, of course, to guard against publicity. It is important to bear in mind, however, that publicity and private hearings raise issues that are by no means identical. Private hearings also serve the independent purpose

of ensuring an appropriate atmosphere in the juvenile courts. Similarly, the goal of avoiding undesirable publicity may not necessarily require completely private hearings. The question that we have to consider, then, is the extent to which juvenile court hearings should be conducted in private - and, in particular, whether the press should be allowed access to proceedings in the juvenile court.

The approach adopted in most American states has been to insist upon a complete exclusion from juvenile court hearings of members of the public other than those having a direct interest in the case, with, at most, a discretion left to the judge to permit the attendance of other persons, including representatives of the press, who have an interest in the work of the court. In recent years this restrictive approach has been relaxed or abandoned in a number of states. On the other hand, in England the position has been that, while the general public are excluded from the juvenile court, bona fide representatives of a newspaper or news agency are entitled to be present. The statute makes it an offence, however, for any newspaper or other news media to 'reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person' involved in a proceeding. The law further provides that the judge or the Secretary of State may allow publication of such information 'if satisfied that it is in the interests of justice to do so.' While the Canadian Act is not explicit, generally speaking it is the American practice that is followed in Canadian juvenile courts.

In our view, the English approach is the preferable one. We agree with Wigmore that 'no court of justice can habitually afford to conduct its proceedings strictly in private'.

The traditional function of the press has been to alert the public to improper or undesirable practices. While we have suggested a 'public watchdog' role for the juvenile court committee, we doubt that this is sufficient safeguard. We recommend, therefore, that representatives of the news media should be permitted to attend juvenile court hearings as of right and that, except where expressly prohibited by the judge, they should be permitted to report the evidence adduced at the hearing. We would emphasize that the prohibition against identifying any child before the court, or any child said to have committed an offence, should be retained. This prohibition should be reinforced by an adequate penalty provision in the Act. Moreover, we would also suggest that the number of media representatives should probably be limited to three. Presumably these representatives would be selected by the media themselves, with a final decision left to the judge in the event of disagreement.

A further question is whether members of the public should be permitted to attend the proceedings. We think that generally they should not, but that the judge should be authorized to permit any member of the public to attend where he is satisfied that such a person has a bona fide reason to be present. In view of doubts that have been expressed concerning the power of a judge to exclude the general public under existing law, we recommend that the Act be amended to provide specifically that no person shall be present at any hearing of a charge against a child or young person in the juvenile court except: members of the court and necessary court personnel; parties to the case, their counsel and other persons having direct interest in the proceeding; a maximum of three representatives of the press or other news media; and such other persons having an interest in the work of the court as the court specially authorizes to be present." (161)

The need to develop a consistent policy aimed at avoiding undue publicity and promoting privacy of hearings and confidentiality of court records is clearly recognized by the advocates who propose or approve the establishment of Family Courts with a comprehensive and integrated jurisdiction over all matrimonial and familial proceedings. References have already been made to the procedures in the Japanese Family Court which involve private hearings⁽¹⁶²⁾ and to the procedures in the Family Court of Hawaii both with respect to children's and minor's cases and in criminal proceedings involving adults.⁽¹⁶³⁾ The aforementioned procedures in Hawaii are supplemented by further legislative provision whereby divorce hearings are held in private.⁽¹⁶⁴⁾ In formulating the recommendation which was implemented by such statutory provision, the Commission on Children and Youth of the State of Hawaii stated:

" The existing requirement that all divorce cases be heard in a public courtroom represented an area of concern because the requirement is detrimental to the welfare of minor children since it subjects them to hardship and embarrassment.

The need to protect minor children from public exposure of their individual and family problems led the Committee to recommend that all divorce cases involving minor children be heard in chambers instead of in a public courtroom. Unlike criminal cases, divorce is a family problem and the State is not a direct party to the proceedings. Parents and children should have a right to discuss family problems in an atmosphere of privacy, dignity and neutrality, free of spectators who have no real interest in the problems of the family concerned.

Several judges familiar with the local

divorce calendar have signified their approval of this recommendation." (165)

The confidentiality of the records of the Family Court of Hawaii is also specifically regulated by section 333-39 of the Family Court Act (Hawaii), 1965, which provides:

" Sec. 333-39. Records. The court shall maintain records of all cases brought before it. In proceedings under section 333-8, and in paternity proceedings under chapter 332, the following records shall be withheld from public inspection: the court docket, petitions, complaints, motions, and other papers filed in any case; transcripts of testimony taken by the court; and findings, judgments, orders, decrees, and other papers other than social records filed in proceedings before the court. Such records other than social records shall be open to inspection by the parties and their attorneys, by an institution or agency to which custody of a minor has been transferred, by an individual who has been appointed guardian; with consent of the judge, by persons having a legitimate interest in the proceedings from the standpoint of the welfare of the minor; and, pursuant to rule or special order of the court, by persons conducting pertinent research studies, and by persons, institutions, and agencies having a legitimate interest in the protection, welfare, or treatment of the minor.

Reports of social and clinical studies or examination made pursuant to this chapter shall be withheld from public inspection, except that information from such reports may be furnished, in a manner determined by the judge, to persons and governmental and private agencies and institutions conducting pertinent research studies or having a legitimate interest in the protection, welfare, and treatment of the minor.

No information obtained or social records prepared in the discharge of official duty by an employee of the court shall be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive such information, unless and until otherwise ordered by the judge.

Without the consent of the judge, neither the fingerprints nor a photograph shall be taken of any child in police custody, unless the case is transferred for criminal proceedings. Except for the immediate use of such criminal case, any photograph or fingerprint taken upon such transfer shall not be used or circulated for any other purpose and shall be subject to all rules and standards provided for in section 333-35.

The records of any police department, and of any juvenile crime prevention bureau thereof, relating to any proceedings authorized under the provisions of section 333-8 hereof shall be confidential and shall be open to inspection only by persons whose official duties are concerned with the provisions of this chapter, except as otherwise ordered by the court. Any such police records concerning traffic accidents in which a child or minor coming within the provisions of subsection (a) of section 333-8 hereof is involved shall, after the termination of any proceeding under the provisions of subsection (a) of section 333-8 arising out of any such accident, or in any event after six months from the date of such accident, be available for inspection by the parties directly concerned in such accident, or their duly licensed attorneys acting under written authority signed by either party. Any person who may sue because of death resulting from any such accident shall be deemed a party concerned.

Evidence given in proceedings under the provisions of subsection (a) or (b) of section 333-8 shall not in any civil, criminal or other cause be lawful or proper evidence against the child or minor therein involved for any purpose whatever, except in subsequent proceedings involving the same child under the provisions of said subsection (a) or (b) of section 333-8." (166)

Commenting on privacy of hearings and confidentiality of court records under the Standard Family Court Act and under the Family Court Acts of Hawaii, New York and Rhode Island, which represent three of the four jurisdictions in the United States with a state-wide system of Family Courts, Elizabeth and Richard Dyson observe:

" Juvenile court hearings have long been closed to the public in order to protect against undue publicity. But under the prevailing system in adult domestic cases, any member of the public can wander in from the street and witness courtroom family fights. The family court acts change this practice, extending to adults the same benefit of quiet, private hearings that children have." (167)

Along with the right to private hearings, it should be noted that all the acts except Rhode Island's forbid indiscriminate public inspection of social or clinical reports and records in a case. (168) In Rhode Island, by contrast all records of the family court are specifically made public records, except in non-criminal cases under the juvenile code." (169)

There would appear to be general agreement that the hearings in matrimonial, familial and juvenile proceedings should involve some degree of privacy but that this is not to be confused with total secrecy. The public is entitled to know the kind of justice being administered in the Juvenile and Family Courts and the philosophy and practice of such courts, and the courts cannot be permitted to conduct proceedings in total secrecy. Accordingly, in formulating standards for Juvenile and Family Courts, the United States Department of Health, Education and Welfare has stated:

" The judge should have discretion under the law to decide who shall be admitted to the courtroom. Normally this should be only those who are necessary to the conduct of the hearing, such as the parties in interest, their counsel, and necessary court officials. Witnesses should be admitted as necessary. It is not, however, believed wise to limit attendance by law to those having a direct interest in the case. If juvenile courts are to function efficiently, their philosophy and practice need to be known. The judge should be allowed at his discretion to permit persons having an interest in the work of the court, such as students, research workers, civic leaders, attorneys, clergymen or representatives of the press to attend hearings and to observe the work of the court, with the understanding that no publication be made of names of children or families involved, or their identity otherwise indicated. Great care should be taken not to embarrass unnecessarily families and children through such permission, and in certain types of cases, such as adoptions, such attendance should be forbidden, or allowed only with the permission of all concerned. Subject to reasonable or necessary limitations, the parents also should be permitted to have others present if they so desire." (170)

Detailed proposals were also formulated respecting the confidentiality of legal and social records in the Juvenile and Family Courts.

" The philosophy underlying the specialized court and nature of the actions coming before it demand that certain protections be given to its records not ordinarily accorded those of other courts. The court should keep individual records on each case that comes before it. These records should be of two kinds — legal and social.

Legal

Legal records generally would include the petition, notices and summons, motions, orders, summary or transcript of the hearing, and findings and disposition of the court. Legal records in children's cases involving neglect, delinquency, termination of parental right, and adoption should not be open to indiscriminate public inspection. The child, his parent, or guardian, counsel, and other parties in interest should have the rights to inspect and secure copies of such legal records upon request.

The record of a child's case, including any testimony given in such case, should not be available for use against the child in any suit before another court in which the child is subsequently a defendant or a witness. However, it may be necessary in the interest of justice that such records and testimony be made available to attack the credibility of a child as a witness, for example, in situations where a female child has accused an adult of a sex offense. This exception is advocated on the theory that such accusations often arise from psychological fantasy and that if previous court records are needed to prove this they should be available to the defendant.

Social

In cases involving neglect or delinquency, social records should be started at the time the court is first informed of the situation. A record should be kept of every complaint received by the intake division or worker, including the date, the name, and family involved. If no action is deemed necessary with respect to the complaint, or if a referral is made or counseling provided, the action taken should be recorded on a card or form, indexed and available for reference if a future complaint is received concerning the same child or family.

If the complaint is accepted and the filing of a petition is authorized, a social record on the family should be started. This record, in general, should include the family and personal history of the child, clinical reports, reports from other agencies, the probation or plan of protective supervision, and a record of continuing contacts and activities of the probation officer with respect to the child and family. The social record should also note all court orders affecting the child or parent.

The individual social record should be in the custody of the probation department. Because social records contain so many matters affecting the intimate, personal affairs of individuals, they require a greater degree of protection than that recommended in the case of legal records. The Rules of Court should permit the probation department at its discretion to reveal material from the social record in any child's case before the specialized court to social agencies having a legitimate interest in the case, and to probation departments of other courts for sentencing purposes. Facts from the social records of the entire record if used, should be available to counsel and parties if used as a basis for the court's disposition.

No person or agency other than the judge, the probation officer, or his supervisor should have a prescriptive right to read the social record. The director of probation or the probation officer, according to the Rules of Court, may choose to give information orally or in summarized written form and to withhold information which in their judgement is not pertinent to the purposes of inquiry. When an individual or agency secures information from the court record, the practices established by the Rules of Court should be

followed and the information used only for the purpose for which it was originally released. Agencies having access to information in court records should also make available to court personnel information in their records.

When the community has a social service exchange, the court should register its contacts with such exchange in cases where a petition, or in the case of adults, a charge, has been filed.

Adult Cases

In cases where an adult is charged with a criminal offense and is tried in the specialized court, legal records should be open to the public as they would be if the adult were tried in a criminal court. Such records should be kept separate and apart from those in children's cases.

Legal records in nonsupport cases should be public records. If the specialized court is given jurisdiction over civil actions to determine paternity, the legal records in such cases should be given the same protection accorded such records in children's cases involving neglect or delinquency. Social records in adult cases should be generally accorded the same protection as those of children." (171)

Concern for the need to promote privacy of hearings and confidentiality of court files and records is also expressed in the Report of the Governor's Commission on the Family California, 1966, wherein it is stated:

" The Commission feels strongly that the interest of the parties, their children and society will be served best by restricting the general public from attendance at the hearings of the Family Court, as is presently done in Juvenile Court sessions. We believe that proper inquiry into the sensitive and intricate problems of family breakdown is impeded by permitting general public access, and that resulting publicity cannot but be detrimental both to the parties and to any children involved.

On like reasoning, and again noting the analogue in the present Juvenile Court Law, we recommend that the files and records of the Family Court be made confidential, open to inspection only by the Court's professional staff, the parties to the proceeding or their attorneys and persons whom the Court deems to have a legitimate professional, educational or research interest in the work of the Court. We believe, however, that the fact of the entry of any dissolution decree is properly made public, for the benefit of creditors and other persons with legitimate interests in the status of the family." (172)

Corresponding opinions have been echoed in Canadian jurisdictions. In a study of the concept of unified Family Courts undertaken in Newfoundland, it is stated:

" Because of the nature of proceedings in family court, only persons immediately concerned with the case — parents, near relatives, Department of Welfare officers, counsel and witness—should be allowed to attend a hearing. The judge should be given discretion to exclude visitors or witnesses for such periods as he deems to be advisable. Also, records involving families should be kept as confidential as possible." (173)

And in summarizing proposals for reform, it is recommended that:

" There should be a ban against publication of family court matters, where the court considers it advisable.

The records of the family court should be as confidential as possible. Records should be kept of every case in family court.

Hearings in the family court should be private. The judge should have discretion in permitting people to attend hearings." (174)

Similar recommendations respecting restrictions on publicity and exclusion of the public from the trial of proceedings in Juvenile and Family Courts are proposed in Rule 44 of the Draft Family Relations Act and Rules of Practice Thereunder Prepared for Discussions by the Rules Committee, Provincial Court (Family Division), Province of Ontario, 1972, which reads as follows:

- (a) Unless otherwise ordered, the trial of a proceeding under the Act, shall be held without publicity and in a courtroom from which the public is excluded.
- (b) The trial judge may, in his discretion, admit persons of the public to the proceedings. Such persons shall not be admitted to the proceedings until they have first given their undertaking in writing to the presiding judge that they will not disclose to any person the names of litigants; nor any other information which would identify the litigants or their families.
- (c) Breach of the undertaking set out in paragraph (b) above, shall be deemed to be a contempt of the Court."

It will be observed that this proposed rule envisages a general exclusion of the public and the press, subject to an overriding discretion vested in the Court, whereas the majority of recommendations contemplate only the legislative conferral of a discretion in the court to exclude the public and the press. It is open to question whether any material differences in practice would evolve according to which recommendation is preferred. (175)

Finally, in the context of confidentiality of court records, the Report of the Canadian Corrections Association and the Canadian Welfare Council on the Family Court in Canada has stated:

" Great stress should be put on the confidentiality of all court records. The nature of the material contained in these records is such that great damage can be done to individuals concerned as well as to the work of the court if it is made public. If the court staff members have a reputation of being careful with information given to them, public confidence will be increased.

Canadian law says that the pre-sentence report used by the judge in determining what action should be taken must be available to the accused and to his lawyer. This has been established in Rex v. Stevenson, Court of Appeal of British Columbia, June 22, 1951." (176)

Certain tentative conclusions may be drawn from the above analysis. The general consensus of opinion appears to favour legislative provisions to avoid undue publicity and to promote privacy of hearings and confidentiality of court files and records in matrimonial, familial

and juvenile proceedings. Secrecy, as distinct from privacy, of hearings is to be condemned and a balance must be maintained between protecting the rights of affected parties and preserving the right of the public to have knowledge and an objective means of assessing the administration of justice in the Family Court. The writer is of the opinion that all proceedings in a unified Family Court should be closed to the public, subject to an overriding discretion in the court to admit persons with a bona fide interest. Members of the press and other news media should, however, be specifically empowered to attend and report on proceedings in the Family Court, subject to the limitation that such reports shall not include any particulars that would enable the parties to the proceedings to be identified. Specific guidelines should also be enacted to guarantee the confidentiality of court records, whether legal or social, while facilitating the collection of relevant data to promote the more efficient and effective operation of the court and necessary reform of substantive family law.

VI. Records and Statistics

Constructive resolution of inter-spousal and familial conflicts hinges on an identification of basic causes and the continuing evaluation of methods of treatment and disposition. The thrust of much research in the social sciences is directed towards determining the causal factors of marriage and family breakdown. The task of the social

scientist is rendered extremely difficult by the inadequacy of existing court records and the absence of a central repository for statistical data. It is frequently asserted that a unified Family Court would provide an ideal "laboratory" for the collection and analysis of statistical data relating to the causes and treatment of inter-spousal and familial conflicts and that modern technological aids such as the computer could readily be utilized in providing information which would promote more effective programmes of prevention and treatment. (177)

The desirability of establishing a system whereby every court exercising jurisdiction over matrimonial, familial and juvenile proceedings would maintain adequate legal and social records was affirmed by the United States Children's Bureau as long ago as 1929. In a report entitled "The Child, The Family, And The Court", the following opinions were expressed:

" Every court should have a record system which provides for the necessary legal records and for social records covering the investigation of the case and the work accomplished. The records of investigation should include all the facts necessary to a constructive plan of treatment. The records of supervision should show the constructive case work planned, attempted, and accomplished, and should give a chronological history of the supervisory work." (178)

In an analysis of the extent to which the then existing courts conformed to the above standards, it was stated:

" In the majority of the courts included in the study the social records did not meet the standards specified in either juvenile or adult cases. The records of supervision were as a rule less complete than the records of investigation...Social records in most courts did not give an adequate picture of the problems involved and the work accomplished." (179)

It was further concluded that few courts were equipped to undertake research concerning the causes and treatment of marriage breakdown or juvenile delinquency and that relevant research is vital to assess the validity and efficacy of established or proposed programmes of prevention and treatment. (180)

Arguments in favour of compiling adequate statistical and social data and recommendations for establishing a centralized records system were the subject of further comment in a subsequent report of the United State Children's Bureau, wherein it is stated:

" Fact gathering is essential for the efficient and effective operation of the court. Quantitative data obtained from the normal flow of court activities or from case records are necessary for the following reasons:

1. For public information: Statistical data can be used by the court to describe to the community its year-round operations—information about the children coming to its attention, where they live, the types of situations that bring them before the court, and the action the court has taken. Through these data, the

court is in a peculiarly advantageous position to focus the community's attention on conditions detrimental to children, gaps in the community's program of services to children, and the direction that community efforts for children should take.

2. For administrative and planning purposes: Statistical reports and special administrative studies are essential tools for the efficient planning and administration of the court's program. Trends in data can provide the basis for estimating future needs of personnel and services; work-load data are helpful in indicating staff requirements, or in redirecting or refocusing staff assignments or activities.

3. Research and special studies: Data collected by a professional trained research worker can provide the basis for evaluating the effectiveness of a court's services to children, such as the success or failure of probation. Special studies can be carried on in cooperation with other agencies in the community in an effort to learn more about the relationship of factors (social, economic, cultural, and physical) to delinquency and possible methods of preventing delinquency.

A centralized statistical system should be established under the direction of a person competent to use statistics for research, planning, administration, and public information. Under his supervision, a reliable system of reporting and collecting the necessary information should be established.

Such a system is not possible in small courts. However, even these courts need certain basic statistical data for their own use and for the use of agencies having responsibility for planning and for providing services for children.

A State agency, such as an administrative office of courts, may be able to provide help for these courts through consultation and the provision of uniform reporting forms. This is now being done in some States. Such a procedure also would permit the court, through the State agency, to participate in the juvenile court statistical reporting program conducted by the Children's Bureau of the United States Department of Health, Education, and Welfare." (181)

It is clear that the collection and storage of statistical data is not sufficient in itself and that continuing attempts to evaluate such data must be assured in order to implement necessary administrative changes and amendment or reform of procedural or substantive law. Thus, John C. Scanlon and Kenneth Weingarten have observed:

" Statistical data are frequently collected and stored with no clear conception of the use to which they can be put. They often seem, like many of the ubiquitous superfluities of modern life, to be designed more for show than for service. Their value is most clearly perceived, however, when a decision must be made whose ramifications may be far reaching and profound, a decision which, if it is to be a sound one, must be derived from the most careful analysis of detailed and accurate information. The value of relevant information is never more poignantly felt than in those instances when such a decision must be made and the information is lacking.

It is fortunate, therefore, that those responsible for the [New York] Family Court Act [1962] have provided the basis for the collection of sound statistical data on court functioning. In section 213 the law requires that certain specific items of information be submitted by the Family Court of each county. The Administrative Board, in turn, is required to include such information, by county, in its annual report to the Legislature. Further, in section 212, subdivision 3, and section 213, subdivision 3, in the Judiciary Law, as amended in 1962, the Administrative Board is given wide powers to require information and statistical data from personnel of the Family Court, county clerks and law enforcement officers.

If the mandatory reports are wisely supplemented under the direction of the Administrative Board, the resulting body of information will serve both as a practical guide for administrative and legislative decisions relating to the courts and as a mechanism for providing that the intent of the law be carried out in actuality." (182)

The need for continuing review and evaluation of relevant data is emphasized by Justine Wise Polier, Judge of the New York Family Court, who has stated:

" The administration of individualized justice in cases involving children and families requires re-examination. While uniformity of disposition is neither possible nor desirable, the extent to which judicial action varies and the effect of this variation on the lives of those before the court should be subjected to constant examination and review.

Self-examination, administrative evaluation, and research are especially needed in a court where proceedings are closed to the public and private counsel rarely appear.

The development of reasonable standards for individualized justice in the Juvenile Court requires on-going information about its application in practice. Such information and comparative studies of dispositions should be made available to those responsible for the administration of justice as a basis for judgement and planning." (183)

Recognition of the need for statutory provisions to regulate the obligation to compile and maintain relevant statistical data is evidenced in the Proposed Marriage and Divorce Code for Pennsylvania, Section 203 of the Proposed Divorce Code provided as follows:

" Section 203. Annual Report of Domestic Relations Division. —It shall be the duty of the domestic relations division to make an annual report to the court and to the Bureau of Vital Statistics of the Commonwealth which shall include the following information: The number and kinds of matrimonial causes which have been filed and their disposition, including petitions granted, decrees denied, and cases pending; the number of settlements or reconciliations which have been effected; the number of children involved in matrimonial causes and the number affected by various kinds of dispositions of such causes; the number of cases where support, child support, maintenance, or allowance, was ordered as compared with those where no such order was entered; the number of such cases where the obligor was ordered to pay the sum ordered to the domestic relations division; compliance with court orders and the number and percentage of cases where the obligor has been in arrears or failed to pay sums ordered and the total amount therein involved; the number of cases where action has been taken to collect arrearages or to enforce orders and the kind of action taken; the total amount of support and allowance or maintenance ordered per family and the amount of support ordered per child within the following classes of amounts per month: \$1-20, \$21-40, \$41-60, \$61-80, \$81-100, \$101-120, \$121-140; \$141-160, \$161-180, \$181-200, \$201-220, \$221-240, \$241-260, \$261-280, over \$280; all settlements approved by the court; together with

the median amount of support ordered per family per month, the median amount of support per child per month, and such other statistical information as may be requested by the court or the Bureau of Vital Statistics of the Commonwealth, or which may be of value in the administration and adjudication of matrimonial causes."

In a comment on this proposed statutory provision, the following statements appear:

"Comment: One of the great difficulties in the area of domestic relations law is that there is a serious lack of statistics which disclose the actual operations of the law and its administration. Little, if anything, is known about how the law is operating and the value of certain legal processes in effectuating public policy. Mr. Fred H. Steininger, Director of Lake County Welfare Board, Gary, Indiana, recently issued a Study of Divorce and Support Orders in Lake County for the period January 1, 1956, through June 30, 1957. Some extremely useful and shocking information is disclosed in this study. For example, of the 585 fathers who were ordered to pay support directly to the court during this period (as compared with the 200 who were ordered to pay support to the wife or other person) 89 percent were in arrears or had not paid at all. Some 47 percent had never paid anything pursuant to the order. Presumably, noncompliance would be higher where the order was to pay the sum to the wife instead of to the court. This is perhaps the most shocking flouting of court orders that can be found in our society. If, as suspected, Pennsylvania court orders are being similarly violated, it should be known what procedures and remedies are most efficacious in coping with the problem. It is important to know something about the amount of support ordered per family and per child, the number of cases where no order is entered, the number of children involved in matrimonial actions and how the cases were disposed of. From the Department of Public Welfare additional data may be obtained so that it may be known the

extent to which the public is supporting through public assistance the wives and children of nonsupporters who for one reason or another flout or disregard support orders and thereby shift an economic burden to the taxpayers and jeopardize respect for law and order." (184)

Section 204 of the Proposed Divorce Code for Pennsylvania further provided for the registration of designated facts by the prothonotary with the Bureau of Vital Statistics upon entry of a decree of divorce, annulment or separation. Section 204 reads as follows:

" Section 204. Registration of Facts by Prothonotary with Bureau of Vital Statistics of the Commonwealth. — Upon the entry of any decree of divorce from the bonds of matrimony or divorce from bed and board or annulment of a marriage, it shall be the duty of the prothonotary to file with the Bureau of Vital Statistics of the Commonwealth a registration of the relevant facts in substantially the following form:

COMMONWEALTH OF PENNSYLVANIA COURT OF.....
County of..... TERM NO.

Registration of Facts Relevant
to Divorce or Annulment of Marriage

Type of Action:

Plaintiff (husband or wife):

Date of filing of complaint:
month day year

HUSBAND

WIFE

Full name.....	Full name.....
Usual residence.....	Usual residence.....
street address or R.F.D.No.	street address or R.F.D.No.
.....
city or town state or	city or town state or
country.....	country.....
Race or color.....	Race or color.....
Date of birth.....Age.....	Date of birth....Age.....

month day year.....	month day year.....
last birthday.....	last birthday.....
Place of birth.....	Place of birth.....
Usual occupation.....	Usual occupation.....
Industry or business.....	Industry or business.....
Religious denomination...	Religious denomination...
Any prior marriage?.....	Any prior marriage?.....
If so, state.....	If so, state.....
how dissolved	how dissolved
.....
date place grounds	date place grounds
.....
Place of this marriage	Place of this marriage
.....
Place of this separation	Place of this separation
.....
Number of children born alive	
to this marriage....."	

In an explanation of the purposes underlying this section, the following comments are expressed:

"Comment: It is highly desirable to make the completion of the registration of facts form a requirement in all actions for dissolution of marriage. Responsibility for making of the record should be specified as that of the prothonotary.

The statewide utilization of the same form would greatly facilitate the compilation and reporting of statistical items.

Several states have the items believed essential in divorce registration spelled out in law.

ITEMS	(See Proposed Marriage Code, Section 203, and Comment thereto)
Usual residence	Beside the value of street address in locating parties at later dates, the designation of street addresses enable ecological (spatial) studies of divorce phenomena in urban areas.
Race or color	There is a considerable interest in the prevalence of divorce in the Negro group, with some claims that their standards equal or excel the whites in this regard. The records could be studied from this point of view. Race or color is also a good identifying item in record searching.
Religious denomination	(See proposed Marriage Code, Section 203, and Comment.) There is a considerable interest in whether mixed religion marriages are more prone to divorce. If both marriage and divorce records are collected for a period of years with this item thereon, an analysis could be attempted for Pennsylvania. One state, Iowa, has such records now. Where children are involved in a mixed religion divorce action, this item takes on added relevance.
Marital history	The dissolution of the present marriage must needs take into account the statistical-legal history of the couple. This item should be obtained in the same degree of specificity as in the case of marriage license applications. If such information can be obtained the prevalence of remarriage in its different forms and the likelihood of failure again of the different kinds of mixed marriages can be studied.

Place and date of Marriage	This is basic
Place and date of separation	The date of separation, especially, is particularly important in studying the duration of marriages ending in divorce. This is a much more valid measure than the duration to date of decree. One study made in Connecticut actually obtained the date of the alleged cause of divorce, but to request such information as a regular thing might be considered too demanding.
Children	As a matter of good recording, more than anything else, the listing of all children of the marriage (or children affected by the decree) would seem useful to persons consulting the records. A Rule of Court, No. 207, in Dauphin County specifies this kind of registration. The standard statistical questions are much simpler, and are those given first. Itemizing the children by date of birth—in connection with other dates given—does permit a more specific analysis of the relationship of children in divorce than can now be obtained from records.
Items on outcome	These are rather standard questions, asked in some states." (185)

Detailed statistical data such as that recommended in sections 203 and 204 of the Proposed Divorce Code for Pennsylvania is not centrally filed or readily available in Canada, although limited federal statistics relating to divorce are compiled,⁽¹⁸⁶⁾ as are also certain provincial statistics on marriage.

The inadequacies of existing statistical records in the Family Courts of the United States and Canada have been defined by P.J.E. Cole in the following words:

" As a corollary to the administration of the court it is strongly advised that,

'...court records and studies on a given family...be centrally indexed so that previously accumulated knowledge can be readily available and judicial dispositions arrived at in the light of prior dispositions.'

No administration can ever function efficiently with scattered records. The minimal allowable division should be between legal and social records, principally because the latter have to be kept confidential.

An integrated family court should be the ideal laboratory for studying family related problems and their interaction. But as one social scientist sadly remarked,

'Apparently family courts are making no attempt to build a solidified, factual body of knowledge which could be utilized as an aid to understanding and solving the very problems for which the courts were created.'

In Manitoba the Attorney General's Department does not even put out an annual report. The only statistics that could be found were for the two years that the court was administered by the Department of Health and Social Services which does publish an annual report. Perhaps one answer is to follow Hawaii's lead in appointing a special research analyst attached to the court, and responsible for such things as computer runs on the intake investigations \which could be written up on IBM cards" (187)

And in a more extensive criticism and evaluation of the procedures relating to records and statistics in the Family Courts of Hawaii, Rhode Island, and New York State, Elizabeth and Richard Dyson have stated:

" Even where physical fragmentation, inconsistency of judges, and poor staff communication are problems, they might be partially compensated for by the use of a central index or filing system so arranged that past information on a given family could be quickly extracted and used. Facilitation of just such an efficient data storage system has been one of the prime arguments advanced for family courts. Apparently, however, it takes more than integrated jurisdiction to achieve integrated information, for none of these courts has made any significant improvement on the piecemeal record-keeping methods of states with piecemeal courts. None of the statutes provides for central indexing, nor have judges or court administrators made up for the deficiency by rule or practice.

Apparently no pressing need for a centralized filing system is felt in Hawaii. The senior judge in Hawaii's first circuit feels that the inter-island mobility of the population is too minimal to require such a filing system state-wide. He does feel that central automated files would be useful for the court in the first circuit, though it is not difficult at present for juvenile probation officers to check the domestic relations files for relevant information, and vice versa. There are plans for endowing the judiciary as a whole with a computer system when the projected new court complex is built, and presumably the family court will share in whatever streamlined filing procedures become practicable then.

In Rhode Island the chief judge would like to see a central filing system, but he feels that the court has too many other pressing needs to lobby for one at this time. It would be a fairly simple matter to institute a central filing system in this small state. The Family Court Act authorizes the court to make its own rules for the care, custody and control of records. All that would be needed to implement a judicial rule would be, as the chief judge observed, 'something more than \$3,100 a year to hire a girl with brains enough to do it.' No elaborate electronic devices would be called for to gather information from distant counties, since records for all counties are already centrally stored in Providence. Someone would simply have to cross-index the domestic relations and juvenile files that are presently separately maintained.

New York's problems are more complex. Not only is the state much bigger than Rhode Island, but an obvious means of unifying individual family court filing systems is missing from the statutory scheme. Perhaps the Administrative Board of the Judicial Conference could take steps toward unification of filing under its power to set policies for 'the form, contents, maintenance, preservation and disposition of files and other records,' but there would be no ready source of funds to implement such policies state-wide. And it would be next to impossible for all the semi-autonomous local probation department to coordinate their policies and budgets along these lines." (188)

Certain conclusions may be drawn from the preceding analysis. It appears that, if unified Family Courts are to provide efficient and effective methods of prevention and treatment of marriage or family breakdown and juvenile delinquency, minimum requirements for the maintenance and evaluation of legal and social records must be legislatively defined. Furthermore, a central repository for statistical data constitutes a condition precedent to the evolution of the most efficient and effective procedures in the Family Courts

and to necessary reform of substantive law.

VII. Adequacy of support staff

The bipartite structure of the ideal Family Court with adjudicatory and social functions to discharge has already been defined.⁽¹⁸⁹⁾ The need for well developed specialized services and adequate auxiliary staff to implement such services appears to constitute a condition precedent to the constructive resolution of inter-spousal and inter-familial conflicts under the legal and judicial process. In the words of Professor Murray Fraser,

" Essential to the success of a family court system is the provision of a first-class counselling and conciliation service. It is by the provision of diagnostic and therapeutic services that a family court is distinguished from other tribunals. The legal remedies often take second place to the clinical services of the unit." (190)

It is evident that the judge, acting alone, cannot effectively resolve inter-spousal and inter-familial conflicts in a constructive manner.

As Judge Paul W. Alexander has observed:

" No judge could carry on single-handed for two principal reasons: (1) Even in the smaller counties the work would be far too much for him; (2) A judge is a lawyer and is neither schooled nor trained in most of the special skills required to handle properly the peculiar problems presented by delinquency, broken families, etc. " (191)

The opinions expressed by Professor Fraser and Judge Alexander have been consistently endorsed by the advocates of specially constituted Family Courts with a comprehensive and integrated jurisdiction over all aspects of family law. Thus, the Report of The Governor's Commission on the Family, California, 1966, has stated:

" No matter how highly skilled and dedicated the judge, however, he cannot properly deal with family controversy alone and unaided. The complicated conditions of our changing society and its great advances in the knowledge of human behavior require that the Court be assisted by a trained professional staff, to assist the parties in understanding their positions and to inform the Court of all facts and circumstances material to a proper resolution of their problems. These personnel, trained in the behavioral sciences and appointed by the Court, would be able to provide professional help to the parties not only for the purpose of reconciliation—which is all that existing staffs can do in the present Courts of Conciliation—but also to assist them in reducing the areas of controversy where divorce is inevitable, and to help them respond to the divorce experience with the least possible damage to all parties concerned.

The professional staff would be available to make investigations into all of the circumstances of the children and the contestants before a custody award is made, when the Court deems such an investigation desirable. Thus to create a Family Court such as we envision, staffed with professional personnel, would be to unify and make far more effective the investigative processes which are presently scattered, if available at all." (192)

The above conclusions are echoed in an empirical research study undertaken by the National Council on Crime and Delinquency in the State of Oregon. Commenting upon this research study, William J. Moshofsky has observed:

" *NCCD's Second Major Finding.* Court staff services to assist judges in handling family-related problems are, except in juvenile courts, either extremely limited or nonexistent. Even in juvenile courts, provision of skilled staff assistance for the judges is inadequate in many counties. Moreover, only five of Oregon's thirty-six counties have proper detention facilities for delinquent children.

Comment on Finding. It is not enough merely to consolidate jurisdiction in one court. The court must have adequate interviewing, evaluation, and counselling services and facilities.

The judge needs the help which skilled staff assistance can provide in order to deal appropriately with the complex problems of people. Just as the medical doctor in diagnosis or surgery relies upon X-rays and lab technicians, case histories, nursing and convalescent help, the judge in his 'diagnosis' and 'legal surgery' must have others to assist him.

The idea of having skilled staff to help the 'juvenile court' in careful screening, evaluation, and counseling has long been accepted. And although they are used on a limited basis only, custody investigations in divorce cases have been authorized by statute in Oregon. More recently, conciliation counseling in divorce cases was authorized.

These 'court services' already authorized are simply a recognition of the need for extra

machinery to help the judge as well as the children and families involved. Whether we like it or not, we know the legal aspects of these cases are usually secondary to the underlying personal, emotional and social problems. In juvenile court, the court staff are needed at 'intake' to try to dispose of cases without formal court action, through either informal counseling or referral to other community agencies. In cases which go on to the judge the court staff makes a disposition study (similar to that made by a probation officer), in order to help the judge dispose of the case after he determines the question of delinquency. Court staff also become involved if the judge orders further study or probation.

In matrimonial cases court staff prepared to seek a reconciliation between the parties are available to counsel. If the parties proceed to divorce, court staff may be asked to make an independent study for the guidance of the court on custody issues. Often skilled staff, operating on a neutral and informal basis, can help work out amicable agreements, thereby minimizing the turmoil, hatred, and child damage in these tragic cases.

Little imagination is needed to see that a similar court service is needed in mental illness proceedings and in other proceedings dealing with family problems, and that all should be in one court with common staff, administration, and approach.

But in most Oregon courts other than the juvenile court, this kind of staff assistance is extremely limited. Even in many juvenile courts needs are not being met. Further, there is great variation in functions of staff personnel, standards, quality of staff, and even in the attitude toward the staff.

These court staff personnel work with troubled people in much the same manner as mental hygienists and clinical psychologists and must be familiar with the multitudinous ramifications of human behavior. This requires specialized training and experience as well as an understanding of community organization and service. At the same time, caseloads must not be so heavy as to prevent the staff from doing competent work on the individual case." (193)

Corresponding insistence upon the necessity of providing adequate specialized auxiliary services in the Family court is also manifested in the following conclusions expressed by the United States Department of Labor:

" Most of the statements favoring the establishment of family courts dwell on the advantages that should be derived from their foundation or extension; comparatively little reference is made to the handicaps under which such courts must labor without sufficient and adequately trained personnel. Yet without such personnel a family court may be worse than useless; instead of being an administrator of justice in the light of modern conditions and scientific study it may degenerate into an unwarranted and harmful meddler in domestic affairs.

It is useless to talk about making the administration of justice a process of social engineering if the first principle of both engineering and the administration of justice is not observed—supplying the tools with which the work must be done. It is futile to attempt to adapt law to an industrialized society unless the instruments of law are organized with the efficiency that industry itself has attained. One probation worker can no more handle 150 cases of juvenile delinquency adequately than a judge can adjudicate 150 points of law simultaneously. The new judicial technique, whatever advantages it may have, does not possess the ability to cure by waving a magic wand.

A scientific attitude toward the administration of the law of domestic relations implies recognition of the fact that most family courts are poorly equipped to fulfill the purposes for which they were founded. ...[Enlarged] powers should not be conferred nor new courts created until careful plans for administration have been formulated." (194)

Substantial emphasis in Canada upon the need to establish effective and efficient auxiliary support services in specially constituted Family Courts is amply demonstrated in Part III of the Working Paper on the Family Court prepared by the Institute of Law Research and Reform for the Province of Alberta,⁽¹⁹⁵⁾ in the Final Report on Family Courts prepared by the Family Law Study in the Province of Newfoundland,⁽¹⁹⁶⁾ in the Report on Family Courts prepared by the Ontario Family Law Project,⁽¹⁹⁷⁾ and in the Submissions of Chief Judge Andrews to the Ontario Government Committee on Productivity.⁽¹⁹⁸⁾

Traditionally, submissions in favour of providing substantial specialized services in the Family Court have fallen on deaf ears by reason of the direct financial cost, whether alleged or real, of implementing such a programme. It may be relevant to refer to opinions on this matter expressed by the proponents of such specialized services. The Report of The Governor's Commission on the Family, California, 1966 has stated:

" The Commission is well aware that creating a professionally-staffed Family Court will be expensive, but we believe that the cost will be overborne by the benefits to be derived from a proper handling of family controversies. The costs in dollars from broken homes far exceed the expenditures required to provide proper counseling and professional staff services—the cost of which is in fact large only in relation to the small amounts the law now provides for that purpose. We believe that study and correction of the causes of family breakdown are as important to society as basic researches into cancer, tuberculosis and other physical ills, enterprises at whose funding we do not balk. If by a proper handling of troubled families we can reduce the human wreckage of family disruption, the expense will be more than justified. We cannot afford to reckon the cost of such treatment in dollars; it is properly calculable only in the coin of the individual and social benefit.

Furthermore, substantial savings will result from the streamlining of the administration of justice in family relations cases. With (as we have noted) these matters constituting the greatest part of our civil calendars, the saving of judicial time alone to be achieved by the unification of functions in a Family Court will be considerable." (199)

And in a Report of the Joint Legislative Committee on Matrimonial and Family Laws, State of New York, it is stated:

" It has been contended by the opponents of statutory conciliation proceedings that the complete conciliation services necessary to properly supplement the services of the court create an immense burden upon the courts and upon the taxpayers. Civil defense, water and sewage programs, super-highways, airports and municipal parking facilities are among the many recently developed programs serving as examples of needs thought not to exist or to be important twenty or twenty-five years ago, but which are now socially, politically, judicially and financially acceptable. The same is becoming true of marital conciliation proceedings. Certainly this is more important to the well-being of society than the determination of where to park your car." (200)

Similar sentiments have been expressed in Canada. For example, Fred Reagh has observed:

" In its brief to the National Conference on Family Life held in Washington, D.C. in 1958, the American Bar Association submitted a report which called for wider use of Family Courts of the pattern described above, featuring '...adequate staff...decently paid...so as to attract and keep the best type of personnel.' Recognizing the greater financial requirements of such a court system the report emphatically stated that '....what must be made plain to the taxpayer is that the total cost of the administration of justice is no more than a drop in the bucket of national or state expense —and further, that the cost of the present divorce system, in terms of human tragedy has become too high to be tolerated any longer.' The verbal 'over-kill' in this statement is recognized, however it illustrates the concern of an important legal body with the present judicial handling of the divorce aspect of family law. The report also stated that '...reform of the divorce laws will do no good unless we can establish new procedures in

courts which are especially designed and equipped for the purpose...family courts having jurisdiction over all problems that deal directly with the family or its members.'

In Canada, feelings similar to those of the American Bar Association in the matter of family courts have been echoed by jurists, lawyers, and sociologists alike. The Canadian Welfare Council supports the idea, as does the United Church of Canada, which approved the concept and commended it to the Parliamentary Commission on Divorce." (201)

There is some empirical evidence that the cost of the failure to constructively resolve inter-spousal and familial conflicts far exceeds the anticipated cost of an integrated system of auxiliary services in the Family Court. Commenting upon the study undertaken by the National Council on Crime and Delinquency in the State of Oregon, William J. Moshofsky has stated:

" *Cost to the State of the System.*
The NCCD, in its survey, estimated that an adequate program of services and facilities for courts with concentrated jurisdiction over family matters in Oregon would cost \$4,330,000 per year. This figure does not include the cost of detention facilities for areas presently without them. (The need for detention cannot be measured until adequate staff services are available. It is axiomatic that where good staff services and other resources are present, the need for secure detention decreases.)

Counties are now spending approximately \$2,500,000 for staff services and operating expenses for county juvenile departments. The Oregon Council recognizes that an immediate expenditure of \$2,000,000 a year in state funds by circuit court districts to expand staff services and facilities is neither feasible nor desirable. In the first place, qualified

staff are not immediately available in sufficient numbers. Second, considerable planning must take place to determine precisely the needs of individual circuit court districts before funds are expended.

The Oregon Council on Crime and Delinquency tentatively suggests that \$3,000,000 be provided in state funds for the first biennium to cover (1) grants to court districts for the fiscal year 1968-69, and (2) state administrative expenses for the full two-year period. The latter anticipates a year of planning and advisory work at the local level before the courts will commence receiving state financial assistance.

In addition to approval of the proposal by the Oregon State Bar, it is noteworthy that the Judicial Council of Oregon concurs with the conclusions of the Oregon Council on Crime and Delinquency with regard to court staff services to assist judges in handling family-related problems. Toward this end, the judicial council recommends that 'state aid should be provided for service staffs to assist circuit courts in the solution and disposition of family-related matters.'

...Of one thing we can be sure. The cost to our society of failure to deal effectively with problems of children and families when they come before our courts is far greater than the anticipated cost of the proposed integrated system." (202)

The danger of advocating specially constituted Family Courts with substantial auxiliary services without first calculating the cost

of implementing such a programme and the various methods whereby the cost may be reduced by the use of existing community resources is well recognized in a recent interim report issued by a Commission in New Jersey which was appointed to undertake a study of Family Courts. It is therein stated:

" The Commission views its continuing responsibilities as involving judgements resulting in a final report containing cost estimates and specific recommendations for legislative action. In this connection, the Commission recognizes its responsibility to make specific findings not only concerning the cost of establishing and maintaining a family court system under a variety of alternative approaches, but also identifying means whereby cost factors might be reduced by using existing resources particularly as respects the necessary supporting professional services which might be presently available both in the private and public sectors.

In applying the results of its inquiry to New Jersey's problems in a most specific fashion, the Family Court Study Commission pledges to produce future analysis and recommendations in substantial detail and to do so with due regard for the urgency of the situation." (203

It is essential that the auxiliary support services in the Family Court complement rather than compete with existing social agencies in the community. The desired inter-relationship between the Family Court and outside agencies has been defined in the following terms:

" If it is to be successful a family court

must utilize to the fullest extent other social agencies in the community. Not only does a large part of the work carried on by family courts belong functionally as much to these other agencies as it does to the courts, but in many cases the outside groups are able to supply service that the court is not equipped to give.

Of course, the outside agencies may have the same shortcomings as the family courts. They may not be properly oriented among themselves, and as a consequence their work may overlap as much as the old courts are accused of overlapping. Or, as this study discloses, the family court and the outside organizations may themselves overlap in their endeavors. Once more the difficulty of formulating a general rule without reference to local conditions becomes apparent.

If the resources of the community do not meet the needs discovered it is the duty of the court to inform the public from time to time and to cooperate to the fullest extent with other agencies in obtaining more satisfactory provision. For example, sufficient resources for foster-home care and institutional care of children may be lacking. Facilities for family-welfare service, including help in budget planning and in adjusting various family difficulties, may be inadequate. Provision for diagnosis and treatment of mothers and fathers incapacitated by physical or mental disability may be insufficient. For obtaining these and many other items of an adequate community program the court shares responsibility with other organizations." (204)

The interest of the Parliament of Canada in promoting the constructive resolution of inter-spousal and familial conflicts and in establishing acceptable standards throughout the country must necessarily be reflected in the assumption of responsibility to contribute to the cost of a more efficient and effective administration of

justice in matrimonial, familial and juvenile proceedings. The present scheme, whereby the provinces are primarily responsible for the cost of administering justice, cannot reasonably be expected to accommodate the substantial expenditures which will be necessary to promote effective auxiliary services in a unified Family Court.

VIII. Plant

In formulating standards for Juvenile and Family Courts, the United States Department of Health, Education and Welfare emphasized the need for adequate physical plant in the following observations:

" The physical plant of the court should neither awe nor frighten children. There should be adequate waiting rooms. As far as possible, these should be comfortably and informally furnished. Mothers with babies and children should be able to wait for hearings in smaller quarters, if necessary.

A separate room without the physical attributes of an adult court should be provided for hearing children's cases.

The probation staff should be provided with adequate office space. Individual offices, although more desirable, are not necessary except for supervisory personnel. However, where individual offices are not provided, there should be reasonable sound-proof interviewing offices and dictation booths or rooms. There should be a private office for intake interviews. Waiting rooms for persons not attending hearings should be separate from those provided for persons called to court. Similarly, a separate finance office should be provided for the collection of money to be paid under orders of support. The clerk of court or other person before whom petitions are made out will also need a separate office. Rooms and divisions should clearly be marked.

There should be adequate space not accessible to the general public for stenographic work and filing of records.

Where the court is very small, many functions may have to be combined, but the principles of privacy, informality without loss of dignity, lack of confusion, and comfort for those waiting should be maintained." (205)

The needs of a unified Family Court have been succinctly stated in the following assessment:

" Unity of jurisdiction, of intake, of records and of services will be promoted by having single-structure housing. Small hearing rooms and simple offices are better than huge courtrooms and ornate chambers. In other words, the premises should be functional with emphasis upon simplicity of design and furnishings." (206)

Such basic needs, however, have rarely been attained and have lent credence to the opinion that the Family Court must be elevated in prestige and status to a level corresponding to that of the highest trial court. Thus, commenting upon the existing facilities of Family Courts in the United States, P.J.E. Cole had observed:

" To date the general status of family courts has received far too little attention from legislators. Providing the additional staff was expensive enough it seems, without having to pay for new court houses and the higher salaries of superior court judges. And besides the family courts clientele is mostly made up of people from the lower economic classes, notoriously poor lobbyists for their own causes. As a result there are few jurisdictions that can boast of a really adequate physical plant for their courts. Hawaii and Ohio come close but only on the local level.

The First Circuit Family Court of Hawaii shares with the Supreme Court such physical advantages as air conditioning and access to the latter's library, and at least it can be said that whatever physical disadvantages exist, they are shared equally between the two courts.

In 1954 the Toledo, Ohio family court was housed in a brand new \$1,700,000 building, an event that elicited the following paean of praise from a Washington, D.C. journalist.

'The edifice is something to behold -- a structure of modern architecture and handsome appointments. It is a bright and cheerful place with lots of comfort. Its informal rooms would appeal to anyone but especially to children for walls are painted in pastel colours that match the shades of popular ice cream.'

The wording may be quaintly humorous but the building that inspired it is a reflection of the very real concern felt by the people of Toledo for the welfare of their children and the need for surroundings that would promote humanity and compassion in dealing with broken families. For most other jurisdictions the story is not so happy.

In Rhode Island the facilities can only be described as appalling. Probation officers are forced to conduct their interviews in a room where desks are squeezed together and privacy can only be partially achieved in cubbyholes lining the walls. When the door to the Chief Judge's office cracked, it was replaced by a spare from the basement reading 'Supplies,' a label that remained for months. In contrast to this humiliating situation the Superior Court building is well heated and in good repair.

The family courts of New York City have been called 'dumping grounds' for the poor and the physical facilities offer ample evidence of this. Courtrooms are bare, toilet walls are defaced, the waiting rooms crowded, noisy and decrepit.

'An argument frequently advanced against giving the family court exclusive jurisdiction over adoptions was that nice middle class people would then be exposed to the shabbiness of family court waiting rooms.'

The impression one get is that only people from the wrong side of the tracks ever have domestic problems or raise juvenile delinquents. A family court can only function if it is accepted and respected by the people it is intended to serve...

Although the provision of first class facilities, designed with an eye to future expansion, is the obvious ideal, legislators should at least be prepared to offer facilities equivalent to those enjoyed by the superior courts of general trial jurisdiction. The public image of the family court is formed as much by the comparison as it is by the actual condition of the facilities. Having the family court set up as a division of the superior court would probably promote an immediate improvement in facilities and in this regard it is interesting to note that the family court in Hawaii is a division of the Supreme Court while those of Rhode Island and New York operate separately and apart." (207)

IX. Local Conditions

As has been previously observed, it may be undesirable to formulate a detailed blueprint or single prototype for legislative implementation of the concept of unified Family Courts. The opportunity for experimentation, development and improvement of services must not be stultified

by rigid legislative formulae and the structure and operation of specially constituted Family Court must be sufficiently flexible to permit adaptation to local conditions.

Proponents of the concept of Family Court with a comprehensive and integrated jurisdiction over all matrimonial and familial proceedings have consistently recognized the need for such flexibility as will facilitate the implementation of programmes and services adapted to local conditions. In the words of one commentator,

" Where interest exists within a state for the adoption of a family court system based upon the Standard Family Court Act, careful study and planning preparatory to the drafting of legislation are imperative. Any model or standard legislation to be effective should be adapted to the social, economic and cultural conditions of the state which seeks to utilize it. Many times more problems are created than solved when a model act of any kind becomes law without regard to the individual conditions within the state. That is why emphasis should be placed upon fundamental social, legal and judicial concepts." (208)

The realization that no rigid nation-wide formula can be legislatively endorsed is persistently emphasized in a report of the United States Department of Labor, Children's Bureau, wherein the following statements appear:

" One of the outstanding results of this study is the sharp realization that there can be no nation-wide formula for the legal adjustment of family problems. Local conditions vary, and the population of one State differs in both number and character from the population of another. Domestic relations themselves differ with geography...

In one community there may be an excellent judge and a large and efficient probation staff supported by a group of lawyers and social workers who see that proper standards are maintained in domestic-relations courts; in another these vital elements may be absentIn evaluating the work of family courts it must always be remembered, first, that generalizations are unsafe; second, that the problem of the law, the family, and the court can never be solved adequately unless local conditions are kept constantly in mind." (209)

" Because of variation in local conditions a nation-wide formula for the adjustment of family problems coming before the courts is impossible. Wide differences exist not only in constitutional provisions and court systems but also in the degree of public interest in a social approach to legal problems involving child welfare and family life. Nevertheless, efforts of all interested groups should be directed toward the establishment and maintenance of tribunals that will have broad powers to deal with family problems." (210)

There is however, some danger of exaggerating the significance of local conditions since there may be reason to assume that local variations in the structure and operation of Family Courts are not as significant a factor of success as is the environment of the court and the competence of its personnel. Thus, Professor Henry H. Foster, Jr. has observed:

" An attempt has been made to summarize some of the American experience with conciliation and counseling in the court setting. The differences between the various systems and procedures do not appear to have as great a correlation with success as does the environment of the court and the competence of its personnel. There may be radical differences between a court in a vast metropolitan area such as Los Angeles or Chicago and one in a smaller, more stable and homogeneous community, such as Milwaukee or Toledo, where the

court takes on many aspects of a social service agency. Furthermore, there may be difficulties in providing a uniform system where there are ten branch courts, as in Los Angeles. What the successful systems have in common, however, are able judges, competent professional staffs, and widespread acceptance by both lawyers and the community." (211)

X. Province-wide or nation-wide system of family courts

It is generally recognized that access to the Family Court and its auxiliary services must be provided not only to persons in urban centres but also to persons in rural and outlying areas. Accordingly, the proponents of the concept of unified Family Courts insist that such courts should be established on a state-wide or province-wide basis. The Standard Family Court Act, which was prepared by the National Council on Crime and Delinquency in cooperation with the National Council of Juvenile Court Judges and the United State Children's Bureau, specifically endorsed a state-wide system of Family Courts. A commentator has observed:

" Today only some of the larger cities have family courts. Smaller communities have the same need for a family court, but do not have enough cases to warrant the cost of one. The Standard Family Court Act obviates this obstacle with its proposal of a state-wide family court which may be divided into districts. The family court judge, or judges, of each district will hold sessions in each county as directed by the presiding judge who is elected by all of the family court judges. In order to promote uniformity, all of the judges will be required to meet at least every six months to establish general policies, uniform rules, and forms governing the procedure and practices of the court." (212)

The need to promote uniform policies, procedures and practices and to consolidate statistical and social data in the Family Courts has been regarded as sufficiently important to warrant express statutory provision in the State of Hawaii. Section 333-5 of the Family Court Act (Hawaii), 1965, provides as follows:

" Sec.333-5. Board of family court judges. A board of family court judges, which shall consist of all the State's family court judges, is hereby created. The board shall annually elect from among its members a chairman who shall preside at meetings of the board. The chairman shall have no other authority not specifically authorized under the provisions of this chapter, or any applicable rule of the supreme court, or specifically delegated by a majority of the board. The board shall meet at stated times to be fixed by it but not less often than once every six months, and on call of the chairman.

The board shall discuss and shall attempt to achieve agreement upon general policies for the conduct of the family courts and rules and forms governing procedure and practices in such courts. The board may, within the limitations of the facilities available to the family courts of the State, seek the consolidation of the statistical and other data on the work and services of such courts and research studies that may be made of the problems of families and children dealt with by such courts to the end that the treatment of children and families subject to the jurisdiction of such courts shall achieve the highest possible degree of uniformity throughout the State and to the further end that knowledge of treatment methods and therapeutic practices be shared among such courts. The board may also formulate recommendations for remedial legislation and for actions by the supreme court under its rule making power. All actions by such board shall be subject to the regulatory supervision of the chief justice of the supreme court." (213)

There will, of course, be practical difficulties encountered in providing access to the Family Court and its auxiliary services to persons in rural and outlying areas which have insufficient demands to warrant the establishment of permanent facilities in the local community. Opinion may differ on the question whether the adjudicatory role of the court should be discharged in rural and outlying areas by resident judges appointed on a part-time basis or by full-time judges under a circuit system. In proposing a two tiered system of unified Family Courts, staffed by federal and provincial judicial appointees, the Institute of Law Research and Reform for the Province of Alberta expressed the following opinions:

" There will inevitably be practical problems in extending the services of the Family Court throughout the province. There will be a period during which the court is being built up and during which it will not be able to serve its ultimate area. Some parts of the province are so sparsely populated and so distant from urban centres that it will not be practicable to serve them in the foreseeable future.

We recommend that the judges of the Supreme Court be empowered to sit as Family Court judges and to exercise all the jurisdictions of the Family Court. We recommend also that District Court judges, sitting as local judges of the Supreme Court, have the same powers.

We recommend also that where it is impracticable to provide Family Court services through full-time provincially appointed judges of the Family Court, the Lieutenant Governor in Council should be empowered to appoint part-time provincial judges of the Family Court, with power to restrict their jurisdiction to such Family Court matters as are specified in the Order in Council making the appointment. The government would then be able to appoint a

resident in an outlying area who appears likely to be able to give good service, and to make use of provincial judges who are not members of the Family Court. If the Family Court judges are all appointed by the Governor General, this recommendation will have to be reconsidered.

We emphasize that our goal is to have all Family Law matters administered by full-time specialized judges of the Family Court, whether resident or on circuit. We recognize, however, the practical limitations imposed by geography and availability of personnel and facilities and make these recommendations so that residents of outlying areas will not be deprived of service by reason of our recommended reforms. It follows that Supreme Court judges should sit as Family Court judges only when judges of the Family Court are not readily available and that part-time provincial appointments should be made only where the services of full-time Family Court judges cannot readily be made available." (214)

The Report of the Department of Justice on Juvenile Delinquency in Canada expressed a similar preference for developing a circuit system to accommodate the needs of outlying areas. It is therein stated:

" 223. In many areas of Canada the local magistrate or county court judge performs juvenile court duties on a part-time basis. It has been represented to us that the judge of the juvenile court should devote his full time to that work, and that the use of magistrates and county court judges for juvenile court purposes is ill-advised. In support of this view it is said some magistrates and county court judges find it difficult to adjust their approach to the specialized philosophy of the juvenile court in the afternoon when, on the morning of the same day, they were involved in the trial of a hardened criminal. It is said also that where the two functions are combined there is a tendency to neglect juvenile cases, since these often require a great deal of time. On the other hand there may not be a sufficient number of juvenile

cases to justify the appointment of a full-time juvenile court judge. The use of the local magistrate or county court judge in these circumstances would seem to be sensible in the absence of a better system. However, a better system is available. In several of the American states a state-administered and state-financed juvenile court scheme has been in operation for some time. In Utah, for example, the work of twenty-six ex-officio juvenile court judges was taken over by four full-time judges and one part-time judge. [Nova Scotia] recently adopted a circuit juvenile court system. We recommend that these systems be studied with a view to introducing some such approach in every province in Canada." (215)

Although access to the judiciary can be achieved by the appointment of part-time judges or the development of a circuit system, access to the auxiliary support services of the Family Court, which may involve some degree of continuing association or contact, cannot be so readily accomplished, although it may be possible to establish certain basic facilities and to promote the use of volunteer counselors in the smaller communities. (216) Thus, Donald M. McIntyre has observed:

" An adequate system of referrals is especially important in rural areas where courts have neither the money nor readily available professional marriage experts at their disposal. Concern was expressed, for example, at a recent meeting of the Family Law Section of the American Bar Association over the economic impracticability of setting

up a conciliation service in courts sitting in sparsely populated communities. In these circumstances assistance is sometimes sought from local, qualified individuals who in some instances are willing to donate their services to the court. Alternatively, manpower aid can be solicited from state agencies, but this presents problems of delay and administrative difficulties." (217)

Recent research studies and demonstration projects undertaken in Canada appear to indicate that serious consideration is now being given to the feasibility of establishing viable programmes of volunteer counselling as a means of providing necessary facilities at minimum cost. (218)

The conclusion that Family Courts with effective auxiliary services should be established on a province-wide basis has been endorsed in research studies undertaken in Alberta, (219) Newfoundland, (220) and Ontario. (221) In the Report of the Family Law Project, which is presently being examined by the Ontario Law Reform Commission, the following opinions were expressed:

"It appears to the Family Law Project that any desirable model of a Provincial family court organization ought to be consistent with the following general principles.

The system should be so organized as to facilitate a high standard of judicial process, services, and dispositional facilities. Further, all these should as far as possible be of a uniform standard throughout Ontario. The Family Law Project has gained the impression that, at the moment, there is a considerable diversity of standards throughout the Province and that, for example, the kind of treatment received by a child who comes before a family and juvenile court may vary in a

number of respects depending upon the locality of the court and whether it is a major court in a large urban centre, such as the Metropolitan Family Court in Toronto, or a small court in some outlying part of the Province. But it seems axiomatic that a good family court system should provide a high, uniform standard in all parts of the Province. It follows, therefore, that a provincial system is required, financed and controlled by the Province, and with sufficient co-ordination to produce the desired uniformity of standards." (222)

✓ " It is also most desirable that the services of the court, including its ancillary and specialized services should be uniformly available throughout the Province. It may not, however, be feasible either financially or in terms of personnel, to provide a full range of ancillary and specialized service at every court centre. What is certainly desirable, however, is that such services should be available as needed and that both the people of outlying parts of Ontario, as well as the residents of Toronto and other large urban areas, should have equally available to them a high standard of specialized, ancillary services." (223)

While recognizing the primary responsibility of the provinces to establish the requisite courts and auxiliary services in their respective jurisdictions, the federal government must endeavour to promote acceptable standards throughout the country. Accordingly, the federal government must accept the correlative responsibility of contributing to the cost of implementing an effective system of Family Courts in every province.

ARGUMENTS IN FAVOUR OF UNIFIED FAMILY COURTS

In presenting oral testimony to The Special Joint Committee of The Senate and House of Commons on Divorce, this writer expressed the following opinion:

✓ " The establishment of family courts to exercise an exclusive jurisdiction over all matters affecting the marital or familial relationship would have several advantages. In the first place, a single court with an exclusive jurisdiction over matrimonial and familial proceedings could be better equipped at less cost with expert counselling staff and this would facilitate a therapeutic and conciliatory approach to marital and familial problems and thus place a greater emphasis upon reconciliation as an alternative to a legal decree.

I am fully aware of the fact that at this late stage of the proceedings reconciliation may not be the order of the day. On the other hand, I am not prepared to concede that the opportunity for reconciliation should be disregarded and that the procedure available should militate against the prospect of reconciliation which is quite clearly the case under the existing regime.

The second argument in favour of a family court is that a single court with an exclusive jurisdiction over matrimonial and familial proceedings would eliminate conflicts of jurisdiction where two courts in the same province are seised of the same problem and would also facilitate the more effective preparation of family case histories which would be of substantial value to the court in the disposition of proceedings for matrimonial or familial relief.

Furthermore, the experience in these [American] courts where conciliation and counselling services are utilised is that the end result is to reduce the problems not only in cases where reconciliation between the parties is achieved, but also in the cases where parties go on to obtain a divorce decree. Ancillary matters such as custody of children, visitation rights, and support are often worked out between the parties without the usual rancour which generally goes hand in hand with the more traditional and conventional divorce procedures." (224)

The above opinions are generally endorsed by those who advocate the establishment of specially constituted Family Courts to exercise a comprehensive jurisdiction over all matrimonial, familial and juvenile proceedings. (225)

The submission that such courts would promote constructive methods of treatment and disposition and avoid unnecessary duplication of jurisdiction was asserted as long ago as 1929 by the United States Children's Bureau, which stated:

" It is apparent that the family court, or court of domestic relations, embodies two desires—first, to extend the new method of legal treatment of certain classes of cases, best exemplified in juvenile courts; second, to prevent duplication of jurisdiction by various tribunals. In other words, these new courts involve a problem of legal procedure and a problem of judicial organization." (226)

The advantages of a non-adversary procedure in the Family Court⁽²²⁷⁾ and the elimination of fragmented jurisdiction⁽²²⁸⁾ have been summarized by Professor Aidan Gough in the following words:

" In addition to the benefits of the non-adversary proceedings, the Family Court system would provide immediate practical benefit in other areas, by eliminating much of the duplicated effort and congestion of calendars which characterizes our present process. Consider the following hypothetical case—which would by no means be atypical:

After some months of increasing family friction and discord, the wife obtains an interlocutory decree of divorce, and is given custody of the minor child, a boy aged 11. Upset by the discord between his parents, the boy develops more and more problems at school, and finally refuses to attend at all. He is then referred to the juvenile court as a truant and is made a ward of the juvenile court. After the final decree, the father petitions the court for appointment as guardian of the minor's estate, feeling that the mother is incapable of sound business management. Shortly thereafter, the mother remarries, and her second husband wishes to adopt the boy through a step-parent adoption. After some time, mother and her second husband seek to adopt another child.

Involved in this case are five separate divisions of the superior court, and at least as many ancillary agencies. The reports of one are not readily available to another; much testimony is repetitive; investigations are duplicated; calendars are clogged; and parties as well as taxpayers are put to needless expense and confusion. Since a marital severance proceeding frequently generates one or more such 'collateral' actions, such as petitions in juvenile court, attention should be given to the possibilities of combining them within a single division of the court." (229)

Similar opinions have been expressed by Professor Monrad Paulsen, who has observed:

" There are obvious advantages if one tribunal possesses the competence to deal with all aspects of a single problem. An additional advantage lies in the promise that such a court might employ approaches differing from those commonly used by the ordinary courts. Proceedings involving children and the family ought not be geared to the common adversary process but to processes which are preventative and conserving in character having the aim of maintaining family stability and of rescuing children from the usual disadvantages of condemned misbehavior.

Socialized courts with these aims require a specialized judiciary composed of men and women who understand the court's mission and who have gained the advantage of specialized experience. In addition, these courts need the assistance of professionals from the social and biological sciences. For example, in children's cases (as well as in some other kinds), a family court ought to have an intake service which would help the interested parties to arrive at an adjustment not requiring court action if such an adjustment is possible. After an adjudication of delinquency or neglect, a judge makes a wise disposition only if he has a diagnostic and study staff (social, medical and psychological) to recommend a plan of treatment. The treatment plan itself may require the employment of skillful probation officers. Cases of non-support or family violence can often be best treated by a staff skilled in making the most of reconciliation possibilities. In adoption cases, a social report on the character of the adoptive parents and casework with these parents prior to the formation of new family ties are obviously desirable.

In short, the ideal of a Family Court envisions a court with full power over the main aspects of family troubles—a court, staffed with trained auxiliary services, not limited in its operation to the adversary system." (230)

Additional arguments in favour of unified Family Courts have been summarized by Elizabeth and Richard Dyson in the following statements:

" If jurisdiction over all family problems were merged in one court, with a trained staff able to investigate root causes of family disputes and to suggest or offer appropriate psychological services, some of the deficiencies of the present system of multiple courts might be eliminated and families in trouble might be helped. This is the basic theme of proponents of family courts. Variations on the theme have been regularly advanced ever since the first court with jurisdiction over children's and family cases was established in Hamilton County, Ohio, in 1914.

✓ Besides integrated jurisdiction and investigatory and counseling staff, certain other attributes have been urged for the ideal family court: physical location in one plant with all services concentrated there and central files accessible to all personnel, long-term judges with special skills in handling family problems, status and facilities equal to a state's other trial courts, and state-wide operation so that uniformity of policy and practice may evolve.

Underlying this conceptual structure is a philosophy similar to that of the juvenile court. Just as the best interest of the child is the guiding standard of the juvenile court, the family's best interest is the family court's guide. If psychological tests are necessary to assess a family's needs, these may be supplied by the court's trained staff. If counseling or therapy are considered desirable, these too should be available in court. ...

Besides creating a unitary framework for applying social casework methods to family conflicts, certain administrative benefits are claimed for family courts. Proponents assert that properly established family courts will lead to more efficiency by unifying practices and procedures, eliminating conflicting

decisions, promoting better services through continuity in treatment, reducing administrative costs, eliminating duplication of services, and improving supervision, training and recruitment of staff.

All over the country courts have mushroomed that call themselves 'family courts.' Most of them fall short of the model described, lacking one or more of the three characteristics of integrated jurisdiction, investigatory staff and counselors trained in social work. They may offer some kind of counseling in matrimonial cases, or provide for court inquiry in child custody cases, or some other social service may be tied to an on-going system of piecemeal jurisdiction. Only four states have made a real effort to amalgamate family jurisdiction and to furnish investigatory and counseling services: Ohio, Rhode Island, Hawaii and New York." (231)

It should not be assumed that the establishment of specially constituted Family Courts with a comprehensive and integrated jurisdiction over matrimonial, familial and juvenile proceedings would involve radical changes or totally novel concepts or procedures in the legal and judicial process. Thus, Lindsay G. Arthur, Administrative Judge of the Juvenile and Domestic Relations Division of the Fourth Judicial District Court of Minnesota, has observed that the primary result ensuing from the establishment of such courts would be one of consolidation, whereby consistency and efficiency would be promoted. In articulating this conclusion and criticizing current divorce procedures, Judge Arthur stated:

" A Family Court would add nothing new, but would merely consolidate the existing structure into a single court. It should not be considered as a novel, social encroachment into individual and family privacy; these invasions now exist, usually at the request of the family itself. A Family Court would merely combine the various existing forms of judicial intervention into family affairs. Nothing new would be added except the fruits of the consolidation - consistency and efficiency.

Consistency and an overview of family complexities are surely the primary justifications for the consolidation. A consolidated court could provide consistency of case assignment, consistency of judicial training, consistency of judicial approach, consistency in the objectives of judicial intervention, and consistency in social casework. Similarly, it could provide an overview of the whole family rather than simply an investigation of a delinquent child, or a cruel and inhuman father, or financial inadequacy of parents, or similar forms of tunnel vision forced on our courts by the present jurisdictional strait jackets and separations. A single court could examine the entire relationship between parent and parent, parent and child, child and child, family and in-laws, and family and the public. And, having explored the whole complex of relationships, a single court could provide consistent and continuing consideration of each aspect of the problem.

A further reason impelling urgency in the consideration of a Family Court is the increasing breakdown of the American divorce system. It has become trite to say that the divorce rate has reached a crisis stage, or that divorce laws create more hostility than they solve, or that divorce procedure is overly expensive and unduly complex, or that the evidence in divorce courts has little correlation with the true reasons for divorce, or that the divorce courts have lost the respect of the bar and the public. The point has been passed where the public merely expresses dissatisfaction: the press is publishing articles and editorials about the problem; husbands' unions are forming; legislative committees are holding more and more meaningful hearings; the clergy decries the system vociferously. American divorce procedures have been challenged, found wanting and changes will be made. Since

a major segment of family litigation is in flux, it would seem opportune to re-examine the entire area of family litigation with a view toward establishing a Family Court." (232)

The postulates or guiding principles underlying the policies and practices of Family Courts have been defined by Judge Paul W. Alexander as follows:

" There are a half dozen postulates or guiding principles which generally govern the practices and policies of family courts insofar as they are not prohibited by or in conflict with the substantive law of the state:

1. Persons involved in various kinds of family litigation or proceedings are generally in need of guidance and aid of various kinds, in addition to that rendered by the impersonal, judgmental and punitive processes of the law.

2. With rare exceptions such persons are unfamiliar with the varieties of aid available and are quite insensible of the particular types of help appropriate to their individual problems.

3. It is better for the family and all its members to make peace, resolve conflicts, and compose differences than to engage in pitched battles in the courtroom.

4. The traditional adversary procedures of the law when employed to resolve intrafamilial conflicts tend to fan the flames and intensify antagonism between and among members of the family; therefore such procedures should be displaced as far as possible by the non-adversary or conference type of procedure in both determining issues and prescribing remedies; provided that the conventional adversary procedure must always be available to any person demanding it for the finding of disputed facts.

5. Prevention is better than punishment. The family court should apply the law and exercise its powers, express and implied, in such a way as to serve the best interest of the family unit, conserving the marriage if possible; and in case of irreconcilable conflict between or among members of the family, then so ask to protect the more helpless members of the family as equitably as possible.

6. Care must always be taken to see that no person is permitted to take advantage of, or profit by his own wrong.

7. Persons seeking relief from marital and other family problems by recourse to law and courts should not be denied appropriate help or turned away whether before, during or after litigation; provided it is desirable for lawyers and courts to refer such persons to other agencies when it is clear that neither lawyer nor court has the means to afford such persons the type of help indicated, or that such help can be rendered better by the other agencies.

The foregoing is not an authoritative definition of the family court, but rather a general description gathered from the observations of various persons who have studied family courts in operation." (233)

Summarizing the arguments in favour of establishing specially constituted Family Courts with a comprehensive jurisdiction over matrimonial, familial and juvenile proceedings, Judge Alexander has enumerated the following factors:

1. Avoids conflicts of philosophy.
2. Avoids conflicts of jurisdiction.
3. Avoids multiplicity of litigation.
4. It is more economical for the family.
5. It saves lawyers time and effort.
6. It saves courts time and effort.
7. It provides a common repository for family records.

8. It encourages social agency co-operation.
9. It tends to develop specialist judges.
10. It develops more effective staff work.
11. It is the cheapest way to render the necessary service.
12. It makes for greater certainty.
13. It helps the judge avoid mistakes.
14. Results produced. (234)

Two additional factors might be added to the list enunciated by Judge Alexander. First, the consolidation of jurisdiction in a unified Family Court with specialized auxiliary staff would facilitate the more effective observance and enforcement of maintenance orders.⁽²³⁵⁾ The extent to which default occurs under subsisting maintenance orders in Canadian jurisdictions cannot be precisely ascertained but the difficulties of enforcement are undoubtedly compounded by the current fragmentation of jurisdiction and absence of centralized records.⁽²³⁶⁾ Secondly, the establishment of specially constituted Family Courts would facilitate legislative implementation of a divorce regime premised on marriage breakdown. Thus, Professor Brigitte M. Bodenheimer has observed:

"It is clear from the psychiatric evidence that the wish of one of the partners—and frequently the wish of both—to end the marriage does not necessarily mean that the marriage relationship is in fact completely disrupted. The expressed desire for divorce may be a communication to the other spouse that something is seriously wrong or a communication to others that there is a crisis requiring outside help, and may thus be a turning point rather than the end in the continuing dynamics of the marital relationship. It follows that the desire for

divorce alone cannot serve as a ground for divorce.

It is generally agreed today that the old fault grounds have outlived their usefulness. There is also growing consensus that divorce should be granted when the marriage has completely broken down. When translating this very general idea into a criterion usable by a judge, however, care should be taken to avoid a complete swing of the pendulum from yesterday's marriage breakdown without recourse to divorce, to today's divorce without breakdown.

Use of a conciliation staff is one way to avoid this result. This staff would serve two purposes:

- (1) it would prevent unnecessary divorces; and
- (2) it would report to the judge when conciliation attempts have been fruitless and the parties are irreconcilable, a factor which is always a major indication, and perhaps the best obtainable evidence of complete marriage failure." (237)

The various individual opinions above expressed have been endorsed in research studies undertaken in the United States. In a Report of The Commission on Children and Youth for the State of Hawaii, which preceded the enactment of the Family Court Act (Hawaii), 1965, the following observations were made:

" Locally, the concurrent handling of some types of family and children's cases has resulted in overlapping of services among the District Courts, the Circuit Court and the Juvenile Court. In divorce cases, for example, judges have been rotating the calendar annually for many years, which system has brought about only fragmentary services. With due respect to our judges, who must operate within such a system and who are beset by problems of inadequate staff and heavy caseloads, such a system has meant perfunctory handling and sometimes inconsistent actions due to differing philosophies held on to by six judges who have been rotating the divorce

calendar. Under such an arrangement, 'escape' from marriage has not been held to a minimum, children have been pawns in custody battles, and the adversary nature of proceedings has been diluted in many cases by divorce by arrangement.

Legal and social reasons support the desirability of placing in one court the power to handle virtually all problems relating to family and children, such as those which the Act offered and which jurisdictional powers the committee approved. The legal reason is found in the need for an effective judicial machinery to cope with inter-personal family problems. The social reason comes from society's concern for the protection of children and family life and recognition of the need to use the scientific knowledge and skills available to afford such protection.

The Family Court, with a specially qualified staff, under one leadership, with a common philosophy and purpose working as a unit, and exercising exclusive, original jurisdiction over family and children's problems, is a constructive step in meeting such a need and in providing such protection." (238)

In a summary of the arguments in favour of establishing specially constituted Family Courts with a comprehensive and integrated jurisdiction over all inter-spousal, familial and juvenile proceedings, the Report further stated:

"A Family Court:

1. Represents a single forum for handling the legal-social problems of family life which require the attention of the law and of necessary related service from the professions of medicine, psychiatry, psychology and social work.

2. Would insure legal and necessary related services when these are needed the most.
3. Would assure continuity of necessary legal and related services.
4. Would be a decided improvement over the State's existing program of legal services to children and families where jurisdiction is divided and, possibly, uncoordinated.
5. Would contribute towards improving and strengthening family life and ultimately the welfare of families and children in the State of Hawaii." (239)

Similar conclusions were expressed in a recent Report of The New Jersey Family Court Study Commission, wherein it is stated:

" It is the Commission's first conclusion that

1. A PROPERLY STRUCTURED FAMILY COURT WITH ALL NECESSARY SUPPORTIVE SERVICES AND APPROPRIATE JURISDICTIONAL SWEEP IS NEEDED IN NEW JERSEY

The Commission finds most persuasive the following argument by Prof. Henry H. Foster, Jr., of New York University School of Law. Many similar arguments have been presented to the Commission.

'During the last thirty years there has been increasing recognition that courts have the opportunity, if not the duty, to render affirmative and constructive assistance to families in difficulty. Recent advances in the behavioral and social sciences have made it obvious that law will be inefficacious, or even destructive,

if the courts ignore the consequences of their decisions and neglect the social, economic and human aspects of complex problems. Moreover, concern has been increasing about the social and economic cost of family breakdown and its traumatic impact upon members of the family and the community. Broken homes spawn juvenile delinquency. They also affect mental and physical health producing tensions and neuroses that are reflected in school, industry, and business. ...

Since there are children in the family in a substantial number of divorce cases, the state's interest in the welfare of these children demands that the courts be permitted and encouraged to adopt realistic procedures which assure the conservation of marriages, even where valid legal grounds for divorce are present. It has been argued that the traditional legalistic approach to divorce creates more problems than it solves, that if constructive help is not provided the precipitating cause of family breakdown may be carried over to subsequent marriages and that traditional divorce procedure does little to safeguard the interests of children. It has been suggested, moreover, that as many as one-half of the divorce cases that are filed might be abandoned or dismissed if the couple were to obtain timely expert assistance. These criticisms have been recognized in attempts to establish so-called family courts.

The ideal family court, which has not as yet been established in this country, would have comprehensive and integrated jurisdiction over all or most family problems, employ a professional staff of psychiatrists, psychologists, case workers, marriage counselors, and probation officers, and be committed to the philosophy that its function was to act in the best interests of the family and society. Delinquency, marital difficulties, support problems, and the like, are interrelated and may be facets of a larger family problem. The family court, therefore, should attempt to focus on the overall family problem. Unfortunately, the establishment of an ideal family court, or sometimes any form of a family

court, has been stymied by the conservatism of the bar or by courts that refuse to relinquish certain areas of their jurisdiction to a family court.

It is noteworthy that criminal courts have given appropriate consideration to such factors as family background by employing presentence reports to assist in the punishment process. Despite the overwhelming sociological data and the example of the criminal process, however, many states have been reluctant to modernize divorce law and procedure. Occasionally, a judge may attempt to effect a reconciliation or may persuade the parties to engage in marriage counseling, but ordinarily the court will limit itself to the legal issues. Since in most states well over ninety percent of divorces are uncontested, there is little assurance that even the legally operative facts will be established. In the typical uncontested divorce case, proof is by formula and the entire proceeding may be disposed of within minutes. Therefore, in most states, divorcing couples who receive marriage counseling do so independently and at the suggestion of their attorney or some other interested party.' Foster, Conciliation and Counseling in the Courts in Family Law Cases, 41 N.Y.U. L. REV. 353 (1966).

In addition to recognizing what is lacking in the present system, the Commission finds it to be both wasteful and confusing to the public in New Jersey that several different Courts have overlapping jurisdiction concerning family matters; that under our present system effective, centralized record-keeping cannot be established; that court staffs tend to duplicate each others' functions where family matters are concerned; and, most importantly,

that the public feels poorly served, removed from, and unable to cope with the present system. The preventative and remedial functions described above are not provided within the existing system. To the extent that they are available in the private sector they are either inaccessible to those most in need of them or are prohibitively expensive or both. The lack of readily accessible, effective, and low cost intake and counseling services coupled with the aura of formality which characterizes the present system tends to render it distant and forbidding to those most in need of the legal and social services which might ideally be provided.

As a result of all of the foregoing factors and many others, the courts today are called upon merely to ratify and legally confirm an already broken marriage and to fix the rights and responsibilities of the parties. In other contexts, the courts are called upon to function primarily in a penal fashion, offering altogether too limited professional services at a point in time much too late when, in many cases the personality problems and relationships of the juvenile, the adults involved, and other family members have become fixed and are most difficult, if not impossible, to treat remedially.

The waste and confusion resulting from today's disparate and overlapping jurisdictions in matters involving and relating to the family can be largely solved by consolidating all such matters in a single court. Since no existing court possesses both the facilities and reach to handle such pervasive jurisdiction, the Commission recommends that

2. THE FAMILY COURT SHOULD BE A SEPARATE AND DISTINCT DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

Such action is (a) consonant with prevailing thought respecting consolidation of jurisdictions, (b) would cloak Family Court matters with a mantle of dignity and respectability which is necessary if the Court is to function as it should, (c) would confer appropriate status upon members of the Court for the handling of such matters, and (d) would invest the Court with statewide jurisdiction over persons which is also necessary to a properly functioning Family Court." (240)

The opinions expressed in the United States have been echoed in other jurisdictions. In England, Dean L. Neville Brown of the University of Birmingham has observed:

" Many advantages are claimed for the family court. It would eliminate the frequent and wasteful conflicts of jurisdiction where two or more courts claim cognisance of the same family problem. It would extend to the litigation of all family problems the 'therapeutic' approach whereby the court seeks to diagnose and cure the underlying causes of the family disorder or if cure be impossible to perform its legal operation with the least injury to the personalities involved, an approach which has long been applied with success in the juvenile court. The single court could be better equipped at less cost with all expert staff which such an approach demands. In the family court complete records could be kept of the contacts which a given family might have with that or any other court; from these records a family case-history would often be available for the guidance of the court. Above all, the family court would mark a step forward by the recognition that the intimate human relationships of husband and wife and parent and child deserve sensitive handling in a specialised court.

... The introduction of a family court in a locality is likely to mean both that many support problems will be prevented at their source in marriage failure, and also that, where failure does occur, a more effective judicial process will be available to those in need of support.

How far has the movement achieved success? In many states today there are courts which style themselves family courts. Very few even approach the ideal which has been described." (241)

In a detailed analysis of the deficiencies of the existing fragmentation of jurisdiction in England and of the need for a unified Family Court, the Institute of Judicial Administration at the University of Birmingham has stated:

"10. It seems incontrovertible that this multiplicity of courts, each with differently qualified arbiters, different welfare personnel, different practices and, in some instances, different laws, is both cumbersome and anomalous. But the case for a family court would still be persuasive even if these anomalies did not exist. For it is extremely arguable that the current unprecedented spate of reform (some already achieved, some still to come) of the substantive law demands a fresh approach to family and welfare law.

It is arguable that the law in this area has a positive, and not merely resolute, role to play. For instance, one of the avowed objects of a good divorce law, according to the Law Commission in its successful advocacy of the new divorce reform, is 'to buttress...the stability of marriage.' To this end the new Act introduced some thoroughly praiseworthy machinery designed to encourage the reconciliation of spouses. In the view of many practitioners, these provisions are a dead letter, largely because the constitution, and possibly the attitude, of the existing courts is alien to the creative task of reconciliation.

11. Hitherto, the courts in this country have limited their function to the solution of disputes in the family. The law has come in when things go wrong. But the reconciliation provisions of the Divorce Reform Act obviously do not have this purpose. Here, there is a tentative, embryonic shift of emphasis from family breakdown. In Kahn-Freund's words, '....to prevent family breakdown, and to mitigate its consequences, the law needs to step in before the marriage has collapsed, and even when no collapse is in sight'. (Foreward to Eekelaar, Family Security and Family Breakdown (1972)

12. There are other examples where the law might pursue a 'creative' course. Juvenile misbehaviour—its relation with family breakdown; adoption—the matching of adoptive parent and child and the effective counselling of adoptive parents; consent to marry when young—preparation for marriage; all these have this in common: that the law has a role beyond the mere resolution of a dispute. In all these instances, the legal process should be a creative element in the cementing of personal and familial relationships.

Perhaps this is true indeed of all aspects of what is commonly classified as 'family law'. Even matters so apparently 'legalistic' as matrimonial property disputes may be seen primarily as efforts to create a future for spouses as relatively free from strife as is humanly possible. They might be perceived 'with the future in mind' rather than as a solution of a present riddle based on past conduct. We are not impressed by the suggestion implied in the Working Party's paper that certain areas of family law are more 'legalistic' than others, and therefore should not be justiciable by a family court.

13. We shall consider later what ought to be that constitution of the proposed courts. Suffice it to say now that we consider that there is a need for courts containing personnel with skill in the social and human sciences. We also consider that lawyers have a large role to play. We are convinced that a 'family council' as opposed to a court would not be desirable. But we think that a type of lawyer concerned with family matters should be a man or woman with an understanding of and sympathy for the aims of these other disciplines, able to meet and talk with such experts 'in the same language'.

We think the establishment of family courts would indeed itself encourage the emergence of this type of lawyer. It might have an impact on legal education. At present, one suspects amongst lawyers some degree of scepticism of marriage counselling and child psychology. This would stand a good change of disappearing if marriage counsellors and child psychologists were

attached to a court and in daily contact with lawyers. Conversely, the occasional distrust of legal processes and personalities felt by social scientists might well diminish through more frequent contact. Perhaps even a common, comprehensible language might emerge!

14. We are convinced therefore of the need for something approximating to the family courts which have been established in some parts of the world, notably in several jurisdictions of the U.S.A., and in Japan. The following suggestions are put forward somewhat tentatively in response to the penetrating queries raised by the Working Party in its paper. But we feel that these highly important details are in need of urgent comparative exploration and research. It is very desirable that first-hand knowledge of the various alternatives be gained, and we respectfully suggest that at least one member of the Law Commission undertake an inspection of the courts in the U.S.A. and Japan." (242)

Canadian opinion coincides with that expressed in the United States and England. Recent years have evidenced an increased concern about the present fragmentation of jurisdiction in Canada and a growing recognition of the need to establish Family Courts with a comprehensive and integrated jurisdiction over all matrimonial, familial and juvenile proceedings. (243)

In conclusion, it should be observed that the advocates of the concept of Unified Family Courts recognize the limitations of the legal and judicial process in contributing to the solution of inter-spousal and familial problems. In the words of Professor Herma H. Kay,

"The suggestion offered by the family court is that the 'basic problems of family life in modern society' can be approached constructively through the normal individual's deeper understanding of himself and his increased awareness of how he presents himself to others within the context of his marriage. No one suggests that a divorce court is the only or even the best place to acquire such understanding and awareness. For many, however, it may be the only place available at the critical time; and for them, it will hopefully become a convenient place to begin." (244)

CRITICISMS AND LIMITATIONS OF UNIFIED FAMILY COURTS

Having canvassed the arguments in favour of establishing specially constituted Family Courts with a comprehensive and integrated jurisdiction over all matrimonial, familial and juvenile proceedings, it is now appropriate to examine criticisms and arguments against the establishment of such courts. Relatively little opposition to such courts has been voiced and accordingly the primary source of criticisms and arguments against such courts is derived from the opinions of those who advocate unified Family Courts and postulate prospective criticisms and objections for the express purpose of refuting them. A particular exception to such source material may be found in the submissions of the Trial Division of the Supreme Court of Alberta respecting the Working Paper on Family Court, which was prepared by the Institute of Law Research and Reform, Province of Alberta⁽²⁴⁵⁾ and widely circulated in order to evoke a public response. Generally, the analysis and proposals set out in the Working Paper met with the approval of commentators. The Trial Division of the Supreme Court of Alberta, however, stated its opposition to "a precipitous plunge" into the scheme of unified Family Courts proposed by the Institute of Law Research and Reform on the ground that there was no evidence that the "radical" proposals set out in the Working Paper would achieve the desired results. Two of the primary issues examined in the submissions of the Trial Division of the Supreme Court of Alberta related to the role of the court in the resolution of inter-spousal and familial conflicts and to the possibility of a specialized judiciary developing an insensitive and mechanical response to such conflicts by reason of excessive exposure thereto. Thus, the

following statement appear:

"Is it the function of a court to assume responsibility to maintain the family unit intact? Such a goal is essential, let there be no mistake about that. But within the framework of our society, is it properly a court's role to become an arm of the state responsible to provide a last line of defence against the breakdown of the family relationship? Is this not more properly the function of others?....

One of the historic roles of a judge in the common law system is that of an impartial arbiter between the individual and the powers of the state within the framework of the law. The philosophy at the root of the recommendations of the Working Paper appears to be that in the domain of family law this historic role will be replaced with something else. The Trial Division believes that the intimate, full-time association of judges, sometimes functioning as interrogators and initiators, with court services such as investigation and 'enforcement', will derogate from this traditional role, and this at a time when courts are increasingly condemned as forming part of the 'establishment', sub-servient to the views of the authorities. The Division is opposed to this recommendation." (246)

"[It] is logical to assume that judges whose time is spent entirely, or almost entirely, with family law, would have the best chance of developing the greatest understanding of problems arising out of the family relationship. But it seems to the Trial Judges that other factors are involved as well. As has already been pointed out, they believe it essential to bring to each of these trying cases dispassion, sensitivity and compassion. They wonder if they could continue to do so if faced daily with these matters, and if there might not be a danger that their outlook would become insensitive and mechanical? They ask themselves if a steady diet of these cases would inhibit the court's role in many of the bitterest, of providing a means whereby husbands and wives may unburden their marital problems, often at great length, before a sympathetic, impartial listener." (247)

The consolidation of jurisdiction in a unified Family Court has also been criticized as likely to lead to congestion of court calendars and consequential delays in dispositions respecting non-domestic litigation. In this context, Professor Herma H. Kay has observed:

" Opposition has also developed, however, even to the combined jurisdiction of the family court over its domestic calendar which includes matters now handled by the domestic, probate, conciliation, and law and motion calendars of the superior court. Critics of the plan argue that the long term assignment of judges to specialized calendars such as the family court will increase an already critical delay in processing non-domestic litigation and will impede flexible court administration by preventing temporary assignments of judicial personnel to congested calendars. Such opposition appears misplaced, since the consolidation of family matters in one calendar can be expected to reduce the overlapping of jurisdictions and the consequent duplication of effort required by present law." (248)

It has further been contended that consolidation of jurisdiction in a single court may impose an excessive burden on the judiciary and support staff in the Family Courts and impair existing services and facilities. These matters were the subject of the following comment in an early report of the United States Children's Bureau:

" In the study of the Ohio courts special attention was given to these considerations. So far as could be observed the only serious difficulty involved in the exercise of the extensive jurisdiction that these courts possessed was the overloading of the judge with divorce cases. The proportion of the judge's time devoted to divorce business was naturally much greater than the proportion that the divorce cases bore to the total number of cases dealt with, inasmuch as all divorce cases were heard by the judge, whereas many of the other cases (especially in Hamilton

County, Ohio) were handled unofficially by the probation department. Contested divorce cases also occupied a very much longer time than cases of any other type....

With a few exceptions probation officers already engaged in juvenile work have not been burdened with adult cases as a result of the organization of family courts, the juvenile case loads generally being lighter than the adult case loads, as has been pointed out. But in many communities the juvenile court was greatly in need of a larger, better-organized staff; and it may be questioned whether the time, effort, and money devoted to domestic-relations cases should not have been directed first of all toward improving the service rendered in children's cases." (249)

Similar reservations concerning the desirability of expanding the jurisdiction of the Juvenile and Family Courts to encompass divorce proceedings were tentatively advanced in a report prepared in 1960 by the Canadian Corrections Association and the Canadian Welfare Council. It is therein stated:

"Whether divorce should be handled by the family court is debatable. Such an innovation might result in an influx of cases which would ultimately push the present work of the family court into the background. The situation would be particularly difficult unless there were some revision of the current legislation governing divorces. The present problems of evidence in divorce cases would be too great for the family court as now constituted to handle." (250)

Insofar as the arguments in favour of unified Family Courts are premised on the need to avoid fragmentation of jurisdiction, the danger of continuing fragmentation notwithstanding the establishment of such courts must be recognized. Thus Justine Wise Polier, Judge of the New York State Family Court has observed:

" Only fifteen months have passed since the inauguration of the Family Court, so it is too early to say whether the high hopes for this legislation can or will be fulfilled. But it is not too early to raise questions about its course thus far and to consider recommendations to strengthen its future.

Despite thoughtful and persistent effort by the Administrative Judge in New York City, little progress has been made toward achieving a unified approach to family problems. The court as a whole has authority to consider all the problems under its jurisdiction; in practice, however, each of its divisions--the Juvenile Term, the Support and Conciliation Term, the Family Offense Term, and the Filiation Term--is limited to the particular aspect of the problem formally presented to it.

There are few judges who, having taken jurisdiction over one aspect of a family's problems, feel that they can or should initiate proceedings on other aspects or that they can secure the probation, clinical, or placement services needed to do so. Probation has neither the skilled staff nor the flexibility to deal with the great variety of related problems. The sheer weight of the calendars and the probation caseloads all but make it impossible for judges and probation staff to move in this direction. In addition, there is no central index, so that judges in one term are frequently unaware that cases involving the same family are pending in other terms or other counties.

The rotation of judges, the absence of adequate mental health services, the understaffing in probation, especially for the neglected child, and the court's inappropriate and scattered physical facilities--each of these is a roadblock preventing achievement of the Family Court's goals.

In regard to assignment of probation staff and auxiliary services, the Juvenile Term has fared better than other divisions of the new Family Court, but only by comparison within a framework of substandard conditions. Every term of the court is plagued by the absence of adequate physical facilities, the insufficient number of judges, an inadequate probation staff, the lack of modern equipment to provide current information on families known to various parts of the court, the lack of adequate mental health services, and the weakness of community services and placement facilities. These defects make a unified approach to a family almost as difficult today as before the new law was enacted. Still ahead lies the task of bringing together all the problems of neglected children, delinquent children, nonsupport cases, family offenses, adoption, and filiation proceedings not merely under one rubric but within a court that has the authority and ability to provide unified and adequate action and service.

The new court must not become, like its predecessor, a 'dumping ground' for all the persons and problems for which the community has neither adequate services nor sufficient concern. It must not become a lid to contain troubled people, a curtain to conceal problems--an institution whose pretensions are far beyond its capacity.

Legislation undoubtedly has great value in the development of sound community standards, education, and institutions. At the same time, in court reorganization as in other fields,

it may lull the community into a false assurance that the job is done rather than just begun. In the long run the effectiveness and value of the legislation will be determined only by the hard day-to-day work required to implement it, to obtain the means and the personnel to make it meaningful, and to maintain concern for the people who should be served by it." (251)

It will be observed that Judge Polier emphasizes the inadequacy of support staff and auxiliary services in the Family Court. Arguments may be adduced opposing the establishment of unified Family Courts on the basis of the present dearth of qualified personnel to implement the new policies and procedures which are assumed to be necessarily incidental to the establishment of specially constituted Family Courts. Advocates of the concept of unified Family Courts generally reject the notion that such a concept is idealistic or utopian and respond to this argument with the submission that when the need for highly qualified personnel is established, steps can be taken to make such personnel available. Thus, the Report of The Governor's Commission on the Family, California, 1966, stated:

"We are not unmindful of the dearth of highly-trained personnel, and we recognize that there may be, in the first few years of the Family Court's existence, some difficulties in staffing. We are convinced, however, that the only way to meet the need is to create it. Our institutions of higher learning and our agencies of clinical training will then develop programs of preparation on a far wider scale than are presently available." (252)

Similar opinions were expressed in Canada by the Reverend Richard S. Hosking in presenting oral testimony on behalf of the United Church of Canada to The Special Joint Committee of The Senate and House of Commons on Divorce. He stated:

" There is one other objection I wish to speak of for a second and I am finished. Have we the staff to handle it? That question was asked at the turn of the century. Can we afford to introduce this idea of study, diagnosis and treatment? We did not have probation officers but we started it and built up a staff. In 1929 we faced the same problem: where were we to get marriage counsellors and other people to handle things? Again we started it and slowly built up the necessary organization.

I suggest with respect that if this step is taken it will not be difficult to find people to do the work. That is the way of progress." (253)

Professor Herma H. Kay, an advocate of the concept of unified Family Courts, has adopted a more cautious attitude respecting the problems engendered by the dearth of qualified professional staff and has suggested that it might be necessary to defer the implementation of a unified Family Court scheme until the availability of qualified personnel can be assured and that it might also be necessary to initially restrict the availability of the auxiliary services until such time as additional qualified staff become available. Professor Kay has stated:

" The problem of recruiting a professional staff for the court is a real one. The Mortimer Commission [in England] did not recommend the establishment of a counseling service within the court structure, in part because of the shortage of trained workers. Rheinstein, on the other hand, dismissed similar objections with the statement that the establishment of family courts would create a demand for qualified counselors

that would induce young people to enter the field provided the salaries were sufficiently attractive. (254) Unless adequate state funds are made available, salaries are not likely to be as attractive as those available in competing public or private jobs. Therefore, it might become necessary as a practical matter to postpone the effective date of the family court act until courts are able to fill their staffs with qualified personnel, and even then to begin on a small scale by serving only persons with children, later expanding the service to include persons without children." (255)

The dangers of straining the present resources of the courts in order to accommodate a comprehensive and integrated jurisdiction over matrimonial, familial and juvenile proceedings are clearly evident, as are also the risks attendant upon a sudden infusion of more extensive counselling and auxiliary services in newly constituted Family Courts without prior careful evaluation of their prospective roles. Thus, Elizabeth and Richard Dyson have observed:

" Court marriage counseling has become especially popular in recent years. The rapid growth of many of these operations has, however, been attacked by some family court proponents as reflecting an 'incomplete understanding' of the family court idea. In their view,

'These moves have been "hasty" in the sense that the structures and procedures of law and social-work practice have been set up without careful evaluation of the roles they will play. This partial approach has added confusion, increased costs through duplication of services, and, perhaps, postponed the establishment of integrated family courts.'" (256)

The problems created by the dearth of qualified personnel must not,

however, be unduly exaggerated. The lack of an adequate number of well-qualified professionals may be offset to some extent by the development of new techniques and procedures. For example, recent experience in the United States appears to indicate that group counselling and group orientation can provide a process whereby " a minimum number of staff can efficiently reach a large number of people to either build a bridge to the counselling process or to at least reduce a great deal of the emotion laden material related to their divorce action." ⁽²⁵⁷⁾ The utilization of volunteer counsellors could also ease the pressure and demands that would otherwise be imposed upon the professional staff attached to the Family Court. ⁽²⁵⁸⁾ The use of para-professional personnel could further relieve the highly qualified professional staff, and especially the counselling staff, of the many tasks which presently absorb their time and reduce their primary contribution — that of counselling — to the constructive resolution of matrimonial and familial conflicts. ⁽²⁵⁹⁾

Even if the difficulties of securing a sufficient number of highly qualified personnel can be effectively resolved, however, the cost of staffing the Family Courts might be regarded as prohibitive. As stated previously, the advocates of the concept of unified Family Courts naturally refute this suggestion and assert that the cost of implementing an effective scheme of support services would fall short of the social and economic cost resulting from the present failure to attempt a constructive resolution of matrimonial and familial problems. ⁽²⁶⁰⁾ Thus, Thomas Coakley, Judge of the Superior Court, Mariposa County, California, has stated:

" The problems of staffing such a court with trained psychiatrists, psychologists, counselors and others is no small one.

We are told that the supply of trained personnel is grossly insufficient to meet the need presently and in the foreseeable future.

But looking to the day when supply and demand come more nearly into balance, does it not make sense to use such trained persons in the courts of California, whether as presently constituted or with constitutional or statutory changes designed to achieve the principle of the so-called Family Court? That the Superior Court and Board of Supervisors of Los Angeles County think so is evidenced by the funds and effort devoted to the Conciliation Court of that County.

Let us examine the matter of expense from the state level.

The Governor's budget for fiscal year 1957-58 called for approximately \$35,500,000 for the Department of Corrections (state penal institutions), \$15,000,000 for the Youth Authority, and approximately \$115,000,000 for the Department of Mental Hygiene (state mental hospitals). This is a grand total of \$165,500,000.

Breaking these figures down to the average cost per inmate or patient, we find that it costs the taxpayers approximately \$131.00 per month to maintain a prisoner in a penal institution, over \$300.00 per month to maintain a youth in a California Youth Authority facility, slightly less than \$200.00 per month to maintain a patient in a mental institution.

The state budget is exclusive of large sums spent by counties for like services and facilities. In Los Angeles County alone the annual budget for care to needy children, most of whom are from broken homes, is \$41,000,000.

Certainly, all persons in state prisons, state hospitals and CYA facilities are not the product of broken homes, nor can it be proved that all of them come from homes in which guidance was lacking.

Similarly, an errant spouse or tension in the home is not the sole cause, and may not be a major cause for the large numbers in state mental institutions.

But it can be said without fear of reasonable contradiction that the kind of disturbed and broken family relationship we are considering... account for a very high percentage of the state prison and Youth Authority population and for a substantial portion of state hospital patients.

Returning to the matter of costs, would it not be less expensive for the taxpayer and better for society in general to use a portion of the \$165,500,000 budget for professional services designed to correct the causes of family discord and its consequences, than to deal with the after-effects only?

Ten per cent of the annual budget, or \$16,500,000 would go a very long way toward staffing every Superior Court in the state with sufficient personnel to do the kind of job under discussion, assuming qualified personnel become available." (261)

In a critical appraisal of the concept of unified Family Courts, however, Elizabeth and Richard Dyson have observed:

"We do not, however, think 'more money, more staff' is the answer to the problems of family courts. We are skeptical of the likelihood that court social services will ever be supported by state legislatures to the extent deemed necessary by those who work with family courts, but even more importantly, we doubt that spending more for social services represents a sound investment." (262)

Perhaps the most significant argument that may be raised in opposition to the concept of unified Family Courts is premised upon the experience

of the Juvenile Courts in the United States. Insofar as the concept of unified Family Courts involves an extension of the philosophy and procedure of the Juvenile Courts, trenchant criticism of the operation and practices of these courts merits serious consideration. In two leading decisions of the United States Supreme Court, Re Gault and Kent v. United States,⁽²⁶³⁾ it was held that informal procedures adopted by the Juvenile Court violated the civil and legal rights of the alleged juvenile offender. In Kent v United States, Fortas J. stated:

"While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raised serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a parens patriae capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." (265)

The abuse and violation of civil and legal rights in the Juvenile Courts of the United States is clearly demonstrated in the following observations of Jacob L. Isaacs:

"Since at the heart of the juvenile court movement was the vision of the court as a benevolent parent dealing with his erring child, the thesis was widely held that legal counsel could serve little function in the new scheme of things other than to obstruct and delay the providing of necessary diagnosis and treatment by pettifoggery and technical obstructionism.

Experience ultimately demonstrated, however, that excessive rejection of traditional legal safeguards and procedures carried with it the seeds of abuse of individual rights. The jurisdiction of the new juvenile courts could be invoked in some jurisdictions on the basis of vague allegations of anti-social behavior. Informality of procedure was sometimes equated not only with the absence of legal representation but also with the acceptance of uncorroborated admissions, hearsay testimony and untested social investigations as the basis for adjudication. The usual protections against self-incrimination and double jeopardy were repeatedly rejected as inapplicable to the civil rehabilitative approach embraced by the court. The judge wielded great discretionary power shielded from the glare of public scrutiny, his broad range of dispositional powers including commitments for indefinite periods to institutions having 'therapeutic' facilities of at least questionable value. The safeguard of appellate review, although available, was scarcely invoked.

Perhaps the perfect judge could also act the perfect parent and dispense true justice and understanding without the fetters of elementary due process. Unfortunately, however, judges being human suffered the imperfections of humanity, and the existence of recurrent instances of disregard of individual rights in the social courts were soon noted, and a rising wave of criticism emerged. Corrective measures were initiated to meet these abuses. Appellate court decisions began to measure juvenile court procedures and determinations against more rigid standards of basic due process. More recently, statutes governing juvenile or family courts or parts of courts were amended to incorporate or provide greater legal safeguards for individual rights. A significant aspect of more recent

development has been the repudiation of the thinking that had discouraged the participation of lawyers in 'social' courts and the mounting demand for legal representation of children in these courts. Of particular interest is the fact that this demand has not originated with the bar but with various social agencies, which have concluded that juvenile and family courts can fulfill their expectations only if a proper balance of legal and social objectives is maintained." (266)

The abuses and violations of civil and legal rights encountered in the Juvenile Courts of the United States could be reproduced in the broader context of a comprehensive jurisdiction over matrimonial and familial proceedings being exercised by unified Family Courts. Professor Herma H. Kay has referred to the dangers of such a possibility occurring but has concluded that a well-conceived plan of unified Family Courts, coupled with reform of substantive law, may promote a constructive and therapeutic approach to the resolution of inter-spousal and familial conflicts without impinging upon the civil and legal rights of the affected parties. Commenting on the Report of The Governor's Commission on the Family, California, 1966, wherein the concept of specially constituted Family Courts is endorsed, Professor Kay has stated:

"[The] California plan does not place the caseworker in the unhappy position of gathering information from a party to be used against him. It does not, for example, provide for compulsory counseling. It is careful to protect the voluntary conciliation counseling which is available with the safeguard of absolute confidentiality between counselor and client. Reports made to

the court will be submitted to the attorneys for both parties for approval before they are given to the judge. By these and other devices..., the professional staff and the persons before the court are protected against the conflicting loyalties and compulsory atmosphere that so greatly hindered the effective work of the juvenile court. Moreover, attempts to curtail the use of traditional adversary techniques in the family court should not entail a mass exodus of attorneys from divorce practice. Rather, the proposed system hopefully will free the lawyer from his present role as an amateur family therapist and allow him to devote himself to the legal aspects of family dissolution such as the division of property, the establishment and enforcement of support, and the protection of children.

The second major difference lies in the degree to which the California proposal rests upon reform of the substantive law of divorce. The juvenile court proponents established an institution and a procedure for dealing with child neglect, dependency, and delinquency, but they did not question the use of violation of the criminal law as one basis for the court's jurisdiction. The court was to treat the offender, not the offense; indeed, the offense was unimportant except as an identifier of the child who needed the court's services. The point is that, while the juvenile court movement produced no critical review of the criminal law as it applied to children, the California proposal begins with the conviction that establishment of a family court without an accompanying thoroughgoing revision of the substantive law of divorce would be a useless gesture." (268)

In the final analysis, it is submitted that the risk of arbitrary decisions and abuses of the legal process may be radically reduced by the appointment of highly qualified personnel and the availability of legal counsel. As was stated in a report of the United States Children's Bureau in 1929,

"The system of the old courts was based upon checks and balances; the actual power of the new courts is practically unlimited. Justice in the old courts was based on legal science; in the new courts it is based on social engineering.

In other words, whatever analogies may be drawn with old common-law cases and customs, the vivid fact emerges of departure from an attempt to obtain justice by precedent and abstract reason and of return to an attempt to reach justice in the individual case.

From one aspect the new freedom may be the old tyranny. 'The powers of the court of Star Chamber were a bagatelle compared with those American juvenile courts and courts of domestic relations. If those courts chose to act arbitrarily and oppressively they could cause a revolution quite as easily as did the former.'

The new socialized procedure is gaining ground steadily and has affected not only the treatment of juvenile and domestic-relations cases but also general criminal procedure. Fundamentally and applied within its proper sphere the theory of the new procedure is sound because it is adapted to modern conditions. It can be successful in practice, however, only if it lives up to its theory. It must be supplied with the exceptionally able, trained man and woman power that its success demands. It must be regarded not as an end but as a means toward legal and social development. It must be treated frankly as an experiment requiring constant watching and study. Emotionalism must be shed, errors must be acknowledged when they are found, and facts must be dealt with. Finally undue haste to abolish the safeguards and the science of the common law must be avoided. It must be remembered that law is only a part of life, only one science among many to be used for social betterment; but it must be borne in mind, too, that law can not make over life. ...

The effective limits of the enforcement of the law are after all pragmatic. If the law can be enforced more adequately, if its final aim of justice can be obtained more completely through the new socialized procedure and socialized courts, those means must be found—provided always that in seeking to do justice no injustice is committed. The criticism of unwarranted meddling with the most intimate personal relations of humanity is not new and is not always unfounded. A meddlesome and ill-equipped family court may do far more harm than the old common-law tribunal, whose mischief at least was limited." (269)

In the specific context of inter-spousal disputes, the utilization of therapeutic procedures, which are regarded as an essential feature of unified Family Courts, has met with strong criticism. Professor Max Rheinstein has stated:

" The therapeutic approach starts out with the observation that people who appear in the divorce court are people in trouble. What they need is sympathetic help and expert therapy. ...Only where, in the judgement of the experts the attempted cure has failed or appears completely hopeless at the outset, will the judge grant a divorce, in which case he would also undertake, again with the help of his staff, to work out a plan of adjustment to their new situation for the parties as well as for their children.

Unquestionably, this plan is attractive. It seems that it may at one stroke reduce the number of divorces, present to the courts the full state of facts, and thus prevent the practices of collusion and perjury. In spite of these prospects the plan has not found widespread adoption. Indeed, it presents a number of serious difficulties.

The least serious of the objections is that which refers to the high cost of maintaining the large staff of experts which a family court requires. If the court achieves what it is said it will, the cost of running it will easily be overbalanced by the saving of the cost of juvenile delinquency, alcoholism, and general dependency of abandoned wives and children.

Not too weighty either is the reference to the fact that we do not presently have enough trained psychologists and psychiatrists to staff a considerable number of family courts. The demand which would be created by the establishment of a network of such courts is likely to attract a sufficiently large number of young men and women to undergo the necessary training, provided, of course, that the salaries offered will be sufficiently alluring.

Serious, however, are two other arguments which are both connected with the fact that under the therapeutic approach a divorce could no longer be obtained as a matter of right but rather as a favor to be granted or withheld in the discretion of an individual judge and his staff. ...

Any such formula necessarily implies a prediction [on the viability of the marriage] which, at the present state of psychological knowledge, cannot be made with certainty. It must rather be expected to be colored not only by the state of knowledge of the individual judge or some influential member of his staff, but also by their personal predilections and general attitudes toward religion and public morality. ...

The problem is presented in an even more acute form with respect to the therapeutic aspect of the family court's activities. If it is to be effective it will in many, if not most, cases have to aim at the reformation of the party's character and personality. ...

If psychiatry really can do what the advocates of the therapeutic approach expect it to do, it holds such frightful possibilities that one should hesitate to impose it as an indispensable condition upon any one who seeks to be freed from a tie of marriage.

In the setting of a divorce case it is not very probable, however, that treatment will have such a profound effect. It must be doubted, indeed, whether it is likely to have such effect at all. ...

There exists, of course, another likelihood, that after enough failures the attempted diagnosis and therapy will degenerate into an empty formality.

The therapeutic approach plan is thus endangered in two opposite respects. The diagnostic-therapeutic efforts either constitute a compulsory attempt at psychoanalytical exploration and personality transformation, or they are at , or approach, the stage at which they are meaningless. In all probability, they will be both, the former in one place and the latter in another. Local differences must also be expected, as we have already indicated, with respect to the attitudes which will be displayed by different judges in the evaluation of a particular marital rift as being curable or hopeless. In other words, it will turn out that in one court a divorce can be obtained easily and speedily and in another only with difficulty and delay. Such a situation will inevitably give rise to the development of what has been called in Germany divorce-geography, a practice of migratory divorce which appears to have developed almost everywhere the law allows the grant or denial of a divorce to depend upon the discretion of individual judges." (270)

Professor Rheinstein's indictment of therapeutic procedures has been questioned by Professor Henry H. Foster Jr., who has stated:

" There has been considerable argument about 'compulsory' conciliation and counseling systems. The two principal objections to these systems are, first, that reconciliation efforts are futile in many if not most cases and, second, that compulsory counseling violates the integrity of the person. It should be understood, however, that if competent professional personnel are available, such a system should reach and save more marriages than a voluntary system.

Although compulsory conciliation may be useless in some cases, the results in Wisconsin demonstrate that success is possible. It has been noted that conclusions based on surface observations as to the unlikelihood of a reconciliation are not always reliable and that sometimes the parties who show the greatest hostility are the ones who later resolve their difficulties.

There may also be the factor of saving face so that a party who would consider it a sign of weakness to ask for a conference may willingly submit to compulsory conciliation. Many parties desperately want help and guidance and in many cases the counselor serves only to counteract other influences and restore freedom of choice. It is this group that lends itself to effective short term conciliation or counseling. The size of the group depends greatly on local conditions, social attitudes toward divorce, the concern of lawyers over their responsibility to encourage reconciliations, and the local divorce law and procedure. The opportunity to succeed with such reconciliation-prone individuals is at its maximum before divorce litigation is commenced, but it by no means follows that even voluntary counseling efforts should cease once a divorce petition has been filed since the experiences of most of the courts considered is that it is not fruitless to try to save any marriage where in reality there is motivation on the part of one or both individuals to make a fresh start.

The argument that compulsory conciliation systems constitute an assault upon personality might have merit if parties were coerced into therapy or forced to disclose intimate facts. Compulsory conciliation, however, may not work that way.

'In practice, the interview of the marriage counselor with the parties is no more than a diagnostic screening interview. Its purpose is to determine whether there is reason for further endeavors to locate the source of the difficulties between the parties and to seek to reconcile their differences. If there is such reason, the parties are encouraged, but not required, to return for further counselling sessions. If referrals to a community resource, for example, a clergyman, or mental health clinic, is indicated the parties are encouraged but not required to cooperate

in such referral. The preliminary, diagnostic interview is used to determine whether further efforts to reconcile should be made.' (271)

Thus, the system does not force a party to stretch out on the psychiatric couch, to relate the story of his Oedipus complex, to submit to a lobotomy, or to endure brainwashing. The integrity of human personality is not violated. It must be conceded, however, that from a psychological viewpoint the court counselor may be an authoritarian figure who influences the party into a course of action that otherwise might be rejected. Since counselors are specialists in persuasion, an effort will be made to induce submission to counseling." (272)

The dangers to which Professor Rheinstein referred have been recognized in the Report of The Governor's Commission on the Family, California, 1966. Thus, commenting on the proposals therein set out, Professor Herma H. Kay has observed:

" Finally, the California proposal reaffirms the commitment of the family court to the therapeutic principle. It does so, however, within the context of a careful protection of individual privacy in the counseling process. Although the initial interview is mandatory, no attempts should be made to force either confidences or reconciliations. Marriage counseling is not required; it is available only upon request and within the confidential relationship made possible by the guarantee of absolute privilege. It must be reiterated that the state cannot require as the price for permitting a divorce proceeding that the parties enter long term therapy. Nor should the state be able to condemn the parties to endure the empty shell of a legal marriage that has ended in fact; it is for this reason that the California proposal denies to the judge the power of permanently refusing divorce." (273)

A less significant objection to the therapeutic process relates to the consequential delay which may be encountered before judicial severance of the marriage bond. This objection has been countered by the following observation of Professor Aidan R. Gough:

" It may appear that this is a time-consuming process. It is the author's belief that it is rightly so, so long as there is some means of affording rapid injunctive relief. The lapse of time, coupled with efforts at reconciliation conducted in a proper setting, can provide a 'cooling-off' period at a time when this can be of greatest benefit. Under our present system, with the interlocutory period, we approach the problem backwards: When the parties first appear in court, we tell them, in effect: 'You're severed; now you have one year within which to get back together.' If our goal is the resolution of marital problems, and conciliation, this period of time should be provided before the decree severing the marital bond is rendered. In effect, the interlocutory period would be shortened, and placed between the time of filing of the notice and the hearing on the petition.

It is my firm conviction that the adoption of a Family Court Division, with non-adversary proceedings save for cases of disputed fact, would not result in an 'easier' divorce. Conversely, it would give the attorneys, the court, and other agencies involved a framework within which the effective resolution of family problems could be carried out." (274)

In an attempt to summarize the basic objections to the concept of unified Family Courts, reference may be made to the observations of John M. Biggs, who has stated:

" Having put the case for establishing Family Courts, we now turn to discuss various arguments which have been raised against them. A typical example of opposition to a Family Court is to be seen in the hearings which were held on such a proposal in Washington D.C. The vast majority of the witnesses were in favour of the Court because of the way in which it sought to correct the shortcomings of the existing matrimonial jurisdiction, such as we have already seen. Criticism of the principles underlying Family Courts was focused around three main points: i. the removal of emphasis from adversary proceedings; ii. the inquisitive nature of the court; iii. the higher cost of running the court.

Adversary Proceedings. In his evidence before the Senate Committee, Jean M. Boardman, a divorce attorney, criticized the lack of adversary proceedings in Family Courts. He maintained that '500 years of experience had taught the American people (it) is the finest system of ascertainment of truth the world has yet devised'. In this, of course, he was entirely wrong; the adversary system will only come near to finding the truth if the parties really are adversaries. In most divorce cases they are not. Mr. Boardman then continued: 'Senators, if either one of you had a daughter who was involved in a matrimonial case....'. Dangling this fearsome spectre before their eyes, he suggested that a Family Court would prevent a fair trial of the case and that the daughter would go down in history as a shameless adulteress. Arguments which resort to such stupid sentimentality are usually their own executioners but Mr. Boardman was also ignorant of the true way in which a Family Court works. Judge Alexander, speaking of the functions of the Courts, said: 'The first, of course, is *judicial*. It may never for an instant lose sight of its duty to find the facts and apply the law, to safeguard all the constitutional and legal guarantees of all the parties; to decide the case.'

If the divorce is exceptional and genuinely contested, the customary adversary procedure is still used. Accordingly, there is no greater risk of a miscarriage of justice in contested proceedings in the Family Court than in any other court.

Reading between the lines, it would seem that criticisms such as that of Mr. Boardman have implicit in them a fear that the Family Court will cause a loss of fees to practitioners. Mr. Boardman was himself quoted as saying that such a court would 'kill the goose that lays the golden eggs'. For similar reasons, there was opposition by London practitioners to decentralizing the hearing of divorce cases in England. Such preservation of vested interests at the expense of other persons' misfortunes is, of course, completely unjustifiable. It has been found in the United States, however, that there is often no significant diminution in lawyers' earnings after the creation of a Family Court and, accordingly, there is no substance in objections to the Court based on such implicit considerations.

Inquisitive Nature of Court. The second ground of criticism is that the social workers and investigators attached to the court will pry into the personal family affairs. In a letter to the Senate Committee, a practising divorce lawyer in Washington, said: 'I am sufficiently old-fashioned enough to believe that a man's home is his castle, and that family affairs are of a strictly personal and confidential nature. I do not believe that interference with that relationship, either before or after the parties are in court, by social reformers, welfare workers, case workers, psychoanalysts, snoopers, purveyors of gossip, rumour and hearsay, or professional busy-bodies, or no-goods, will be calm and deliberate determination of the personal and property rights of litigants in a domestic relations case.'

This criticism, however, overlooks the fact that judges of Family Courts most obviously do derive a lot of assistance from reports of social

workers; otherwise they would not call for them to be made. Moreover, it is difficult to understand how objections as to infringement of family privacy can be made when it is the husband and wife themselves who are the initiators of public action by presenting their case to the court. The view that the Family Court is a busy-body only encourages the present situation in which the parties, safe behind locked doors, work out with virtual impunity the case which they will present to the court, often in complete disregard of other interests such as those of the children. If, as is admitted, the State has an interest in every divorce case, why cannot that interest be protected and the parties prevented from defrauding the court?

Expense. The third criticism which is made of a Family Court relates to the expenses. The running of such a court, if only from the point of view of the counselling and investigating services, is bound to be more expensive in terms of actual outlay than the conventional type of court. This fact is a very effective means of rallying criticism since most of the costs have to be met from local taxes. On the other hand, proponents of Family Courts argue that, in the long run, the counselling service causes less of a burden on the taxpayer because of reduced welfare payments and losses through crime. Thus, in discussing the proposed plan for a North Carolina Family Court dealing with both divorce and juvenile delinquency, it was said: 'Then, there is the fact that North Carolina's share of the national crime bill is about 120.00 dollars a year for every man, woman, and child in the state, while the proposed family court system would cost each person 63 cents a year. This being the case, the family court system would have to save only one child out of every 190 headed for a career of crime in order to justify its existence financially. These are facts—the hard, cold facts of the head. But they do not even begin to measure the real costs of an inadequate system for handling the broken families and desperate children of the state. Those costs can be measured only in terms of human anguish and degradation, and they are far, far greater than the people of North Carolina can afford.'" (275)

A more critical appraisal of the inherent limitations of Family Courts has been presented by Elizabeth and Richard Dyson, and their conclusions, though detailed, merit extensive citation. They have stated:

" Family courts, though little studied in depth, have garnered almost universal praise. Only one organized private interest group has publicly expressed opposition to the idea of a family court, and only one scholar appears to have raised in print serious questions about their aims and achievements.

This uncritical consensus reflects a practice common in America, of looking to legal institutions for the correction of social ills. This tendency is dangerous; our experience is that courts seldom contain answers to problems arising outside the legal system. We delude ourselves if we think that delinquency and family disorganization can be cured simply by reforms in legal institutions, when the roots of these problems are buried in poverty, a self-defeating public welfare system, and racial unrest.

Further, in setting unrealistic goals for family courts, we may be tempted to blame normative restraints, such as statutory strictures and constitutional guarantees, for failure to achieve these goals — and thus to try to get around them. For example, if family court casework services seem ineffective, one might take the position that lawyers are hampering the courts in the performance of this function, and that lawyers should therefore be removed from the scene. This kind of impatient reaction sometimes seems as common in this country as looking to the courts for final solutions.

We have tried to take a hard and critical look at family courts as 'institutions for the preservation of the family.' We have found no convincing evidence that family courts are any more—or any less—successful in promoting family stability than their predecessor courts. As we have seen, family courts do not in practice seek comprehensive solutions for the family merely because all family problems have been placed under

one jurisdiction. In practice each of the courts studied has divided its judicial business into whatever divisions existed prior to the family court, and each division limits itself to the particular justiciable problem presented to it. Family court social work staffs are stretched so thin working on the immediate problems to which they are assigned—marital counseling, probationary supervision, processing cases at intake—that realistically they do not have time to offer therapeutic assistance to the family as a whole. Often family courts do not even manage to acquire the total family picture: that is one of their main reasons for being, since their record-keeping systems and communications policies are not yet geared to achieve this objective.

If there is no concrete evidence that existing family courts have lessened family disorganization, one can still evaluate the presence or absence of some of the improvements in judicial administration that have been claimed for family courts. Have they eliminated jurisdictional disputes and conflicting decisions? Have they unified practice and procedure in the state? Have they promoted better supervision, training and recruitment of staff?

Certainly in the two states where nearly total family jurisdiction has been bestowed, jurisdictional disputes have practically disappeared. None have been reported in Hawaii, as yet, and only a few sporadic questions of jurisdiction have arisen in Rhode Island since the family court's inception. New York, on the other hand, furnishes a cogent example of the problems likely to arise when judicial reformers fail to gather all family matters into one court.

As for elimination of conflicting decisions, experience demonstrates that judges in a given family court system do not achieve harmonious results any more consistently than do judges of totally different courts. Even in a small state like Rhode Island, the five judges of the family court frequently disagree on basic issues. In New York, conflict among judges in different counties commonly appear in reported decisions. Nor does anything in Hawaii's scheme indicate that

there will be unanimity among the judges of the different circuits. In Hawaii's first circuit there is a potential mechanism for eliminating conflicting philosophies among decision-makers, in the leadership that can be exercised by the senior judge over the referees. Yet in practice there seem to be very little supervision of the referees' substantive work. Indeed, because it is usually the pressure of a heavy judicial caseload that creates the need for referees in the first place, there is some question whether judicial supervision can ever be exercised effectively under a referee system.

Unity of practice and procedure seems to be a function of the administrative scheme under which a family court operates. In New York distant and disparate as the family courts are, one effective means of unification has been supplied in the rule-making powers of the Administrative Board of the Judicial Conference, which is advised and kept informed by the Family Court Rules and Advisory Committee. In Hawaii, on the other hand, failure of the legislators to bestow decision-making powers on the Hawaii Council of Family Court Judges has led to a semi-autonomous system of courts, subject only to the regulatory supervision of the Hawaii Supreme Court. Though in practice the first circuit court usually furnishes a model for courts in the other circuits, each court is free to adopt differing practices and procedures as it sees fit. In Rhode Island, of course, no problems of procedural unity arise, since the state is small enough for the five judges to handle all the judicial business by riding circuit throughout the state.

It is difficult to say whether supervision, training and recruitment of staff have shown any improvement attributable to the establishment of family courts. In the two states where probation departments operate separately from the family court, these departments have continued to function basically as they did before. Reforms and improvements have been matters of internal policy, not family court fiat.

In New York's auxiliary staff recruitment policies have begun to change since the institution of the family court, and counties having no probation departments were required by the Family Court Act to establish them. Otherwise, significant changes and new categories of auxiliary personnel have failed to materialize. As long as local financing characterizes the New York system, this will probably be the case.

In Rhode Island, adoption of a family court did not rapidly lead to new programs of in-service training, higher personnel standards, more attractive working conditions, or more aggressive recruitment policies. Indeed, the absence of a requirement that staff be appointed under a merit system based on competitive examinations seems to have tempted the judiciary and the executive alike to view family court auxiliary staff positions as instruments of political reward. This has been damaging both to the reputation of the court and to the caliber of the auxiliary staff.

Although Hawaii's First Circuit Family Court seems to have an efficiently functioning program for supervision and training of staff, it should be noted that prior to the family court, Honolulu's juvenile court already had very much the same standards and training policies.

Thus it seems that family courts have led to some improvements in judicial administration, but not to all the improvements that have been broadly claimed. Moreover, family courts still labor under many of the problems faced by most juvenile courts: lack of status, inadequate financing, lack of staff, poor physical facilities, paucity of dispositional resources. Solutions to these problems are not easily found.

It would be tempting at this point to make a plea for better resources for the courts, along the following traditional lines: 'Family courts have not been given a fair chance. Like juvenile courts, they have been given tremendous responsibilities without sufficient resources. They need more public understanding, more money, more staff.'

We do not, however, think 'more money, more

staff ' is the answer to the problems of family courts. We are skeptical of the likelihood that court social services will ever be supported by state legislatures to the extent deemed necessary by those who work with family courts; but even more importantly, we doubt that spending more for social services represents a sound investment. In our view, social workers and clinical personnel both have a tremendously important function in the family court scheme in performing investigative tasks. Sensitive preliminary investigations are necessary at the intake level, for trimming judicial caseloads and for screening out cases best dealt with outside the court. Skillful collection of more extensive background material, including that supplied by psychological or psychiatric evaluations where appropriate, is important to enable judges to reach informed and intelligent dispositions. But we doubt the value of trying to offer increased and more elaborate therapeutic services, in the nature of marriage counseling or short-term psychotherapy or similar services. This is partly because many of the family court's clients do not voluntarily solicit such services, and their value may be minimal in a quasi-compulsory setting. It is partly because white, middle-class social workers are often unable to reach and communicate with the lower income groups that constitute the family court's largest group of clients. It is partly because the methods and techniques of social casework are inexact and often ineffective, and even where successful, sometimes prohibitively costly. Therapy usually requires an expensive commitment of time and resources that family courts simply cannot afford to furnish, with detracting from the investigative services they perform.

Assuming no immediate infusion of new funds into family court coffers, we perhaps ought to indicate what changes we think are advisable and possible within present budgetary horizons. We have already said that court personnel should be limited to investigative functions, thus freeing present staff to do a better job on that important front. Beyond that, much improvement could be effected in judicial administration and the insurance of legal rights. There is a great need for more and

better judges. Lighter judicial workloads would help to expedite the processing of family cases, often crucial where children are in detention or needed support checks are in arrears. Rotation of judges should be eliminated wherever possible. Law clerks should be supplied for judges, both in order to save judicial time and so that family court decisions will have firmer foundations in existing decisional law from within and without the jurisdiction. Legal counsel should be available to intake workers, so that doubtful jurisdictional and procedural questions can be competently resolved without wasting court and clients' time. Support collection processes should be mechanized in order to hasten back payments and to free probation officers for more important tasks. To carry out the promise of integrated information, all data on members of a given family should be centrally processed.

Rights of litigants greatly need strengthening, since court powers to alter existing patterns of family life are extremely broad. The right to counsel should be extended to parents in cases of neglect, and it should go without saying that interpreters must be provided in any case where language difficulty prevents a person from testifying or understanding proceedings involving him or his family. Children facing possible incarceration ought to have counsel appointed automatically, since relatively few family court clients are sophisticated enough to appreciate the value of counsel and too few family court representatives understand a lawyer's importance, or attempt to impart their understanding. Appointment of counsel indeed might well be made automatic in all children's cases, not just those involving potential institutionalization, since adjudication of any kind in a family court carries with it a stigma that may have serious, self-fulfilling consequences in a child's life.

Finally, we cannot help but conclude that one of the most serious deficiencies of family courts lies in the area of prestige and public image. These courts are, by and large, 'dumping grounds' for the poor and derelict in our society. They have been shortchanged in New York and Rhode Island by failure to incorporate them into the court system at the highest level of trial jurisdiction. Their physical facilities in these two states are appalling. 'No one is at home' in them. One cannot

expect to promote respect for law in an environment that is crowded, dilapidated, and noisy. One cannot expect judges to enjoy working in such surrounding, nor can one expect lawyers to throw themselves wholeheartedly into their work.

We think that much can be done to improve family courts that does not require lavish expenditure of funds and ever-increasing staffs with more advanced degrees. A sensible framework for efficient and humane processing of human problems does exist in family courts where the concept of integrated jurisdiction is fully realized. If family court goals were realistically limited to providing better judges, better investigative services, speedier access to the courts, and more protection for litigant's rights, family courts could become more dignified and respected institutions. That much alone would be important, especially for those in our society whose contact with the law has already been disillusioning." (276)

An evaluation of the conclusions expressed by Elizabeth and Richard Dyson would appear to be desirable, if not essential, before steps are taken to endorse any concept of unified Family Courts in Canada. Such evaluation should include an assessment of the present operation of the Canadian courts and should pay particular regard to the pilot conciliation project presently being undertaken in the Edmonton Family Court. A further caveat on the concept of unified Family Courts appears in a Report to the Family Law Section of the American Bar Association, wherein it is stated:

"Ardent proponents of judicial conciliation procedures too often make the mistake of inflexibly advocating the creation of an integrated family court. In case after case such a widespread and comprehensive overhaul and reorganization of existing judicial procedures, long established, is too big a legislative capsule for the bench, bar, or legislature to swallow at one time.

In many states the court struture has grown up over the years like Topsy, with numerous courts of varying and overlapping jurisdictions handling matters affecting domestic relations and juveniles. Although all students of family law recognize the need for necessary reforms in this field, proposals to effect a complete reorganization over night meet with a stone wall of opposition; thus beneficial reforms which might be accomplished, if presented and adopted piecemeal, are also lost." (277)

CONDITIONS PRECEDENT TO SUCCESS OF FAMILY COURTS

In the event that the concept of unified Family Courts is legislatively endorsed, consideration must be given to the factors which will contribute to the successful operation of such courts. As is stated in the Report on Family Courts prepared by the Family Law Study in the Province of Newfoundland,

" Of course, it is recognized that the real effectiveness of a family court will not depend alone on written standards or procedures or facilities available but also upon the wisdom, understanding, fairness and devotion of every person concerned with the care and treatment of families. Sound legislation cannot create a good system by itself; adequate facilities and personnel are necessary. Also, a good system cannot exist in a community whose spirit is opposed or indifferent to the accomplishment of its purpose." (278)

Extensive support from all levels of the community has been regarded as a condition precedent to the establishment and effective operation of unified Family Courts. Thus, Professor Henry H. Foster, Jr., has stated:

" Whether a family court or conciliation service is established or proposed, it is essential that it receive support from all levels of the community. There must be a campaign of education as to family problems and proper ways to deal with them so that the public will favor the proposal and local politicians, newspapers, and interested pressure groups will endorse it. Toward this end, bar associations and religious and welfare groups may be enlisted to create sentiment both in the community and in the legislature for a family court or conciliation service. When a family court or conciliation service has been

set up, community support may be fostered by a citizens' advisory board to follow the operations of the court, to assure that the court has sufficient resources, and to be certain that its function is understood by the community. The failure of the plan for Allegheny County, Pennsylvania to secure approval and the discontinuation of the New Jersey and Utah systems vividly demonstrate the hostility of judges, counselors, lawyers, litigants, legislators, or the general community may be fatal to the counseling or conciliation effort, regardless of its form." (279)

And Judge Paul W. Alexander has observed:

" Like all communities, Kansas can have the family court or not, just as the people wish. They will never have it until they want it and they will never want it unless they (1) believe the children and parents and families destined to be afflicted with intra-familial conflicts, domestic discord and marriage failure are standing in the need of help, and (2) believe they can be helped, and (3) want them to be helped." (280)

It is unreasonable to assume, however, that a groundswell of public opinion will emerge without some leadership in the community. Accordingly, active steps must be taken to determine the needs of the community and to assess public reaction to such needs. In formulating submissions respecting promotion of a Family Court in Canadian communities, the Canadian Corrections Association and the Canadian Welfare Council has stated:

" The general pattern in Canada is for family courts to be established in some communities within a province while not in others. If, then, a community is to establish a family court it will be necessary to find a way of building public support and influencing both the municipal and the provincial governments.

To create community interest, it is necessary, first, to get a general idea of the need for such a service in the area. Reports from social workers, and from church and community groups often give indications of the extent of the need and whether the public is prepared to support the idea of a family court. The second step is to supplement this informal information by a more formal community study to assess the full need.

Some sponsoring community group should take the lead in this community study and in making the public aware of the situation once the material is obtained. A community welfare council is a good agency for this job, or, failing that, a long-established service club, local council of women, church group or similar organization. A full-fledge educational program is necessary to stimulate interest and to interpret and formulate policy. A positive approach is recommended; that is, the need should be known and the necessity for a new service to meet this need should be emphasized, rather than stating that present services have failed. The latter might build up opposition. Cooperation from local newspapers and radio stations is essential. Panel discussions with service clubs, social workers clubs, church groups, trade unions, and so on are very useful. Above all, the members of the legal profession should be brought into planning as early as possible, along with the local members of the provincial house and the members of the municipal council.

Once the idea has gained general acceptance some group must be given authority to prepare the formal approach to the municipal and provincial governments. If this group is able to speak with the backing of a large part of the community, and can document its case with facts, it should be able to convince the legislators that the court is necessary." (281)

Corresponding submissions on the need to establish a planning or advisory committee have been expressed in the United States. Thus, one commentator has observed:

" It is recommended that in considering a family court system each state should establish an inter-professional and lay group to function as a planning committee or commission. Its members should represent different sections of the state, different groups within the state, different political parties, and different viewpoints. Social workers and board members of voluntary and public agencies, physicians, lawyers, religious leaders, judges, and representatives of labor and management should compose the membership. This group can effectively stimulate support of a legislative plan. Also, such a group is in a unique position to analyze and evaluate the many complex problems involved. Continuity of the group after the enactment of the legislation, perhaps through representation on an advisory council to the new division, will aid in its interpretation and also aid in its implementation.

The planning group should ascertain what is required and how the major provisions of the Standard Family Court Act can be adapted to the state's needs. In the study process, the various tribunals having jurisdiction over different segments of family controversies—for instance, termination of parental rights, divorce, paternity, support and guardianship—and the personnel engaged in coping with them must first be known. In addition, the volume of each of the specific types of family cases should be noted. This information will furnish a base for determining what judicial structure and facilities including clinical and counseling services will be needed. In this way, a practical plan for establishing the new judicial structure and facilities can be evolved in light of the state's needs.

The planning group should also study how the body of related substantive and procedural law should be modified. Thus, laws pertaining to guardianship, domestic relations, parent and child, and the like should be analyzed to see what amendments are necessary to conform with the new family court legislation." (282)

Although the value of establishing a planning or advisory committee to conduct inquiries and canvass and reflect public opinion respecting the desirability of establishing unified Family Courts is generally accepted, the continuing role of an advisory committee, if and when such courts are established, may be more difficult to define. The experience encountered with respect to the operation of advisory committees in Juvenile Courts in Canada appears to indicate, however, that the committees should be primarily concerned with serving as a liaison between the courts and the community and ensuring the exclusion of improper practices in the courts. These matters and correlative issues relating to the composition of the committees and the mandatory imposition of a committee structure on the courts are dealt with in some detail in the Report of the Department of Justice on Juvenile Delinquency in Canada, wherein it is stated:

"229. The [Juvenile Delinquents] Act (section 27) directs that there 'shall be in connection with the Juvenile Court a committee of citizens, serving without remuneration, to be known as the "Juvenile Court Committee".' Section 27 also makes provision for the composition of the juvenile court committee. It provides that in any city or town where there is a children's aid society, 'the committee of such society or a sub-committee thereof shall be the Juvenile Court Committee' - and further, that where there is no children's aid society 'the court may, and, upon a petition signed by fifty residents of the municipality...shall appoint three or more persons to be the Juvenile Court Committee as regards Protestant children, and three or more persons to be Juvenile Court Committee as regards Roman Catholic children....'. It seems to be the intent of the Act that a juvenile court committee is mandatory, although the wording of section 27 itself is not altogether consistent on this point. In any event, only a few juvenile courts in Canada have the assistance of such committees.

230. The duties and powers of the committee are set out in section 28:

' (1) It is the duty of the Juvenile Court Committee to meet as often as may be necessary and consult with the probation officers with regard to juvenile delinquents, to offer....advice to the court as to the best mode of dealing with such delinquents, and, generally, to facilitate by every means in its power the reformation of juvenile delinquents.

(2) Representatives of the Juvenile Court Committee who are members of that Committee, may be present at any session of the Juvenile Court.

(3) No deputy judge shall hear and determine any case that a Juvenile Court Committee desires should be reserved for hearing and determination by the judge of the Juvenile Court.'

231. The principal questions we have to resolve are:

(a) should the provisions for a committee remain mandatory or be made permissive? (b) what should be the composition of such a committee? (c) what should be the function of the committee? Because we feel that an answer to this last question will assist in resolving the others we examine it now. Under the present Act the committee's functions are extremely vague. In some ways it seems designed to serve as an adjunct to the probation services; on the other hand it seems that the committee is also intended to act as public watchdog to prevent the juvenile court process from degenerating into Star Chamber proceedings; again, the powers vested in the committee by section 28(3) are intended to ensure that important cases will be heard by the judge of the court rather than by the presumably less qualified deputy judge. Whatever may have been the need for these responsibilities and powers in 1929, many are no longer relevant today. The screening function provided by section 28(3) is unnecessary. The judges of other courts are by law deemed competent to handle all cases within the jurisdiction of their courts and we see no reason for distinguishing, in this respect, between juvenile courts and the ordinary courts. In any

event, we recommend elsewhere the abolition of the office of deputy judge. In the early years, the primary role envisaged for the juvenile court committee was probably that of a citizen advisory group in regard to matters of treatment, with perhaps additional service as unpaid probation officers. One submission made to us points out that 'the committee's original function as a "case committee" advising the judge is outmoded now due to the availability of psychiatric and social work resources.....'. It seems, in fact, to have been the experience in both Canada and the United States that juvenile court committees have seldom attempted to perform a 'case committee' function on any regular basis and that, where such attempts have been made, friction between judge and the committee has frequently been the most notable result.

232. The 'public watchdog' or 'sentinel' role seems to us to be the proper function for the juvenile court committee to perform. In our system many organizations may be interested in the operation of the ordinary courts. It is the organized bar, however, that has been in the forefront in such matters as judges' salaries and pensions and the protection of judicial independence. The juvenile court does not have this type of support from any organization or profession. A juvenile court committee can help to provide such support. There are still other features of the 'public watchdog' role. Some of these are suggested in a report prepared by a committee of the Probation Officers' Association - Ontario:

'....Firstly, since the juvenile court will remain largely a "private court" with the public having only limited access to it, the committee must serve as the eyes and ears of the citizenry; it must keep abreast of all aspects of the court's operations, interpreting the court to the community on the public platform, and ensuring that the court is functioning in keeping with the legislation governing it and in accordance with correct judicial processes. The committee can also be of considerable help to the Judge in several specific areas, such as advising and assisting in the

operation of any detention or observation home connected with the court, assisting in the obtaining of necessary financial grants for the court's maintenance, and performing a liaison function with municipal or other governments which may be contributing financially to the court. The committee would have the added duty of working for the correction of any conditions tending to foster delinquency in the local community and of working for the establishment of such health and/or welfare services as would tend to reduce delinquency. The central and basic responsibility however would be one of surveillance of the overall operation of the court to ensure that it continues to provide proper and adequate services to its local community.'

233. We see the juvenile court committee, then, as a liaison body between the juvenile court and the community. One of its major functions should be that of continuous public education in the community to interpret the purpose and philosophy of the juvenile court and to stimulate the support necessary to enable the court to carry out its objectives. Another should be that of general 'watchdog' supervision of the court and the services upon which the court relies. It is our recommendation that in any revision of the law the duties of the juvenile court committee should be redefined in accordance with the role of the committee as we have outlined it.

234. We have received submissions suggesting that the committee should be a permissive one, designed to aid those judges who wish to have its assistance. Other briefs have taken the position that the establishment of a committee should be mandatory. The fact that few juvenile court committees exist in Canada may well be an indication that it is not entirely realistic to make a committee mandatory in all cases. Nevertheless, we think that, so far as practicable, the objective should be to have a

committee working with every juvenile court. The functions of the juvenile court committee, as we envisage them, are too important for its existence to depend in every case upon the whim of the judge. The committee's role is not only to assist him, but is also to assure the public that the juvenile court process is operating in a satisfactory manner. In our view, therefore, it would be desirable if steps were taken to promote the establishment of juvenile court committees throughout Canada. It is perhaps worth adding that in no case should the jurisdiction of the court be affected by the existence or non-existence of a committee.

235. In making these suggestions, however, we think it important to note that the establishment, composition and duties of the juvenile court committee are matters that relate more directly to the constitution and administration of the juvenile courts than to any aspect of criminal law or criminal procedure. The constitution, maintenance and organization of the juvenile courts are, as we have pointed out, primarily the responsibility of the provincial authorities. We are of the opinion that the power of decision in regard to these various questions that pertain to the juvenile court committee should rest with the provincial authorities. Indeed, we find it difficult to see how the federal government can take effective action on matters so closely connected with the actual operation of the juvenile courts. It is our conclusion, therefore, that detailed provisions concerning the juvenile court committee - except as they relate to matters of procedure, such as the right of members of the committee to be present at juvenile court hearings - should be removed from the federal Act and that it should be left to the provinces to enact whatever legislation they think desirable.

236. A number of recommendations have been made to us concerning the composition of the juvenile court committee. It has been suggested, for example, that the judge should have the authority to choose the members of the committee, perhaps from a list of persons recommended by civic groups and by various professions such as law, medicine and social work. There have been suggestions also that the Attorney General should have a voice on the question of membership. Again these are matters for decision by the appropriate provincial authorities. While we make no specific recommendation in regard to the composition of the committee, we would make one observation. There would seem to be no reason why a committee performing the functions that we propose should, as the present Act contemplates, be fragmented on religious lines or have its membership drawn only from children's aid societies.

237. Before leaving this discussion of the juvenile court committee, we think that it may be useful to note a recommendation made by the Governor's Special Study Commission on Juvenile Justice in California, which reported in 1960. The commission proposed that existing juvenile court committees be merged into a system of regional juvenile justice commissions having wide powers to investigate, study and issue annual reports and recommendations on 'the administration of juvenile justice in its broader sense including law enforcement, the courts and probation departments....'. The Commission also contemplated that such juvenile justice commissions would have powers of subpoena, as well as the right to visit local institutions and treatment facilities. Even with juvenile court committees as they are now conceived, it may well be desirable, having regard to the practical difficulties in establishing committees in certain areas, to have some committees constituted on a regional basis. This might require, for example, that a committee operate in conjunction with more than one juvenile court. The California plan is apparently intended to go somewhat further than this. For the purpose of this Report, we do no more than suggest that the California proposals would seem to merit study by provincial authorities concerned with providing for the establishment of juvenile court committees or with finding some viable alternative to the present system." (283)

If unified Family Courts are established, their successful operation will demand widespread publicity of the philosophy and role of the court and of the auxiliary services available to the public. It would be undesirable to rely exclusively upon formally established committees to keep the public informed. Various measures could be devised to ensure that the public is informed of the facilities in the courts and in the

community. It would be desirable, if not essential, to ensure that teachers, lawyers, doctors, the clergy, public health nurses, welfare workers, and the police are aware of the facilities and resources available since they have first hand contact with families in distress and can be influential in directing them to agencies proffering assistance in the community. As Donald M. McIntyre has observed:

" Insuring public awareness of such a service would doubtless increase its use. Presently many persons in large urban centers do not know where to turn for help on domestic relations problems. To this end, it is necessary to publicize the availability of counselling services, whether they be court-sponsored or operating under the aegis of churches, commercial enterprises, or the executive or legislative branches of government." (284)

Consideration should also be given to using the mass media to advise the public of available facilities and resources. (285)

From time to time, suggestions are made favouring the distribution of information at the time when marriages are solemnized, such information being directed to advising the parties of their rights and obligations and of the available resources in the community which can assist in the resolution of matrimonial and familial problems. Such a submission was presented by the Congress of Canadian Women to the Special Joint Committee of The Senate and House of Commons on Divorce, wherein it was recommended:

"That at the time of marriage a government statement be issued with the marriage certificate setting forth the rights and duties of each party, and along with this--information on services available to the family, such as legal aid, family court, marriage counselling, children's aid, etc." (286)

The Conciliation Court of Los Angeles County has consistently recognized the need for widespread publicity concerning the existence of the court, its procedures and functions, (287) and has devised a pamphlet describing the problems incidental to the dissolution of marriage and the philosophy, facilities and services available in the Conciliation Court. This pamphlet is mailed to all parties who file a divorce petition in Los Angeles County. The purpose of the pamphlet and the effect of its circulation have been described as follows:

" It occurred to the Court that if a little pamphlet pointing out the problems of dissolution and explaining the facilities of the Conciliation Court could be mailed to both parties immediately after a petition for dissolution of marriage was filed, that reconciliations might be more easily effected.

Superior Court Rule No. 6 was adopted in 1959 providing that each divorce complaint must contain the names and addresses of both parties in all cases involving children 14 years of age and under. In 1963 the age limit was increased to 18 years. A form letter signed by the Judge of the Conciliation Court, together with a copy of the pamphlet, 'A Personal Message to Parents,' are immediately mailed to the parties. The results from this procedure have been most gratifying.

Since January 1, 1970, the effective date of California's new Family Law Act, the addresses of both parties are no longer available on the petition for dissolution of marriage, but they are available on the confidential questionnaire provided for in the law....

Since this pamphlet has been mailed it has conservatively been estimated that approximately 20 percent of the filings in the Conciliation Court have been directly due to its message.

Other counties in California and courts in other states have requested and been granted permission to reprint it for similar use." (288)

In order to establish any viable scheme of unified Family Courts, it will be necessary to secure not only the support of the general public but also the support of the legal profession, both Bench and Bar. Thus, Professor Henry H. Foster, Jr., has stated:

" There are many prerequisites to a successful conciliation service. The availability of marriage counselors must be investigated to ascertain if counseling in the court setting is feasible. The judge must have ultimate control over the selection of the staff and the services because conflicts can arise where the conciliation service is divorced from the court. Moreover, the judiciary must be consulted as to what is practicable in view of jurisdictional problems and the assignment of judges. The court-creating statute should provide for judges who are oriented to a sociological or case work approach, or who are specialists in handling family problems, although judges should avoid efforts at marriage counseling." (289)

The need to establish a good working relationship between members of the bar and the professional staff in the court is emphasized by Professor Herma H. Kay, who has observed:

" The court's effectiveness will depend largely on the creation of a good working relationship between its professional staff and the local bar. Time must be spent in explaining the new procedures to attorneys and in enlisting their understanding and support. Introduction to the non-adversary

approach of the family court ideally should begin in law school. At the same time, however, the professional staff must learn that lawyers are more likely to cooperate with social work methods if they can be reassured that their clients' legal rights are being respected by the court. The traditional caseworker's attitude that lawyers are abrasive and obstructive must somehow be tempered with the insight that lawyers are trained to evaluate suggestions, including good suggestions, in the light of all the alternatives available to their clients. Community seminars presenting the court's work from both viewpoints might prove helpful in creating the necessary atmosphere of cooperation and mutual respect." (290)

Experience in the Conciliation Court of Los Angeles County indicates not only the importance of the attitude of the members of the bar towards the court, and more specifically towards the counselling services therein, but also the initial lack of enthusiasm that is likely to be exhibited by members of the bar to reconstituted Family Courts. Thus, Judge Lester E. Olson has stated:

" When the creation of the Conciliation Court is proposed, attorneys, in general, are not enthusiastic. Some of the reasons for their reluctance to endorse such a program are undoubtedly due to a feeling that the Court is meddling in their dissolution of marriage cases, and a general lack of understanding of how the Court can aid not only their clients but the attorneys as well.

These are natural reactions and must be answered, if the essential support of the organized bar is to be secured. That such support can be secured has been amply demonstrated in Los Angeles County. Today 50 per cent of all petitions filed in the Conciliation Court are attributable to attorneys referrals.

The factors that have produced this enthusiastic support by lawyers perhaps provide the proper approach that should be taken by any community desirous of establishing a Conciliation Court.

Where a petition for dissolution of marriage has been filed and a referral has been made to the Conciliation Court, attorney's fees are awarded upon a proper showing.

It might be pointed out that these fees are usually more promptly and fully paid than in the ordinary dissolution case.

As one prominent Los Angeles dissolution lawyer observed:

'An attorney has a better chance to collect a fee from a reconciled couple than from a husband who is financially pressed by paying alimony and support to wife and children and attorney's fees on an installment basis. The real vice in the "loss of income" argument is that it implies that lawyers should do nothing to promote reconciliations for purely personal financial reasons. This is our duty regardless of such considerations. In addition, where a lawyer has been instrumental in reconciling a couple, he has two clients for a long time to come; and if for some reason the reconciliation fails, they usually go back to the same lawyer anyway.'

It should not be forgotten that most attorneys also have a genuine interest in the preservation of marriages, whenever possible, and are happy to lend their professional services in reuniting a broken home." (291)

The success of the Conciliation Court of Los Angeles County in ultimately securing the active participation and cooperation of members of the bar appears to indicate that many of the problems arising in the relationship between lawyers and the profession staff assigned to Family Courts or Conciliation Courts are eliminated by a mutual sharing of experience in joint efforts to resolve matrimonial and familial problems.⁽²⁹²⁾

A third condition precedent to the effective operation of specially constituted Family Courts is the development of cooperation between the court with its auxiliary services and other agencies in the community which share the responsibility of contributing to the resolution of matrimonial and familial problems. It is imperative that the auxiliary services in the court complement rather than compete with other agencies in the community. Thus, one commentator has observed:

" Cooperative relationships among the court, police authorities, social service, health, and welfare agencies and institutions within the community are essential to effective functioning. Care should be taken at the outset to formulate referral policies and procedures and these should be reviewed periodically in the light of practice. Among the areas needing special attention are those involving marriage counseling and neglect situations. Family courts should assist people in using community resources instead of setting up duplicating ones or those which more appropriately belong elsewhere. The court should be represented in community councils and should not lag behind other organizations in sharing in the process of sound community planning. With its integrated jurisdiction, the court will be in a favorable position to know community gaps and lacks.

The court should also develop cooperative relationships with law schools and schools of social work within its vicinity, since the court can offer unique training opportunities for students in both professions. An intern program can help students in understanding areas of service and also provide a means of obtaining future staff.

...Justice, service to people, and efficiency in functioning demand that our present diversity of tribunals with their segmented jurisdiction over family problems give way to family courts with integrated jurisdiction and services. These courts can make a substantial and lasting contribution in helping to maintain family living. To this end, team work among judges, lawyers, social workers, physicians and clergy is indispensable. They should join forces with other professional and lay groups to make family courts a reality throughout our land. Because of their position of leadership, law schools and schools of social work have a special obligation in the attainment of this goal." (293)

And, with respect to the inter-relationship between the counselling services in the court and those in the community, Professor Henry H. Foster, Jr., has stated:

" The type of service provided by the court may be dependent upon the cooperation it receives from local counseling agencies. The Los Angeles Conciliation Court works in close cooperation with these agencies and avoids competing with them in long term counseling. A long term counseling service in the court may become a threat to community agencies and practitioners whereas short term counseling may complement such services. Moreover, the larger the court's staff and the more extensive its services, the greater the chance for antagonism between court personnel inter se and with outside groups and interests such as the bar and the counseling professions. The cost

of a large staff also carries with it vulnerability to budget cuts by economy-minded politicians and citizen groups who are often skeptical about the value of social services. Most American courts, with the notable exception of the Toledo Family Court, do not have long term counseling services. It has been estimated that two-thirds of those requiring counseling need long term assistance. This means that where there are serious emotional or mental disturbances referrals will be made to clinics, agencies, and practitioners who may or may not be oriented towards helping the individual or saving the marriage. Unless the court's staff is expert at distinguishing those who need long range counseling from those who may be helped by a few sessions, there will be confusion of function and wasted effort." (294)

BOUNDARIES OF JURISDICTION

Exclusive or concurrent jurisdiction

Advocates of the concept of unified Family Courts generally assert that the jurisdiction of such courts must be exclusive and not merely concurrent with that of other courts. Such an assertion is predicated on the need to avoid conflicts of philosophy, treatment and disposition, which are characteristic of the current fragmentation of jurisdiction. The practical difficulties encountered in attempting to provide adequate facilities and personnel in outlying rural districts have been recognized and appear to be best resolved by the appointment of part-time judges or by the development of a circuit system rather than by the retention of concurrent jurisdiction in diverse courts.²⁹⁵

Ambit of jurisdiction

Although there may be a consensus in favour of legislation that confers comprehensive and exclusive jurisdiction over all family law matters in a single court, problems will be encountered in any attempt to statutorily define the ambit of such jurisdiction since the terms "family" and "family law" defy exact definition.²⁹⁶

Accordingly, it is necessary to define the criteria which should be used in determining whether the Family Court should exercise jurisdiction over particular types of proceedings. The criteria adopted in the Standard Family Court Act, N.C.C.D., 1959, constitute a sound guideline for decision and legislative action. They have been defined as follows:

"Several criteria were used in determining whether the family court should have jurisdiction over a particular action. Is the

issue one which involves intrafamily social relationships? Is it one in which the state has an interest or responsibility, such as the protection of children and the preservation of family life? Is it one where the proper discharge of the state responsibility and the efficient and effective administration of justice require the specialized services of the court?"²⁹⁷

The formulation of general criteria to determine the boundaries of jurisdiction will not invariably resolve whether particular proceedings properly fall within the ambit of family law. Consequently, in statutory provisions or proposals respecting the jurisdiction of Family Courts, specifically designated jurisdictions are included. There may be some value, therefore, in examining a representative selection of statutes and proposals in order to facilitate comprehension of those types of proceedings that might appropriately be designated as falling within the ambit of family law. Such an examination might reasonably encompass the experience in the United States, England, and Canada.

United States

Analysing the jurisdictional ambit of the Family Court as defined in the Standard Family Court Act, N.C.C.D., 1959, and in legislation establishing state-wide Family Courts in Hawaii, Rhode Island, and New York, Elizabeth and Richard Dyson observed:

"One of the characteristics often cited for the 'true' family court is the presence of integrated jurisdiction over all legal matters where children or intra-family relations are involved. With regard to children the Standard Act selects the following matters for the exclusive original jurisdiction of the family court: delinquency, neglect, injurious environment or behavior, ungovernability, custody or guardianship of person, adoption, termination of parental rights, judicial consent to certain acts, commitment of the mentally ill or defective, and actions under the Interstate Compact for Juveniles.

Hawaii follows this model closely. In only one instance is exclusive jurisdiction over children yielded to concurrent jurisdiction with adult criminal courts: where children between 18 and 21 charged with a delinquent act are already under family court jurisdiction for some other offence. As a matter of practice, even these cases are referred to the family court in the first instance, in the First Circuit Family Court.

Rhode Island's Family Court Act has to be read together with the old juvenile code to discover that all the areas listed above except guardianship of children are within the family court's jurisdiction. New York's statutory scheme also requires search outside the Family Court Act to find the complete list of juvenile actions heard by the family court. Ultimately most of the same cases are heard, although certain aspects of certain children's cases may be heard in other courts as well.

With regard to jurisdiction over adults, Hawaii's family court entertains the same cases as are listed in the Standard Act: offenses against children by parents or legal custodians, criminal non-support actions, non-felonious offenses against immediate family members, civil actions for support, alimony, divorce, separation, annulment and paternity proceedings, actions under the Uniform Reciprocal Enforcement of Support Act, and commitment of mentally ill or defective adults.

Most of these matters are heard by Rhode Island's family court as well as some other matters not included in the Standard Act [namely, contributing to the delinquency of a minor and jurisdiction over miscellaneous offences, such as commercial exploitation of children and tattooing children under eighteen.] Commitment of adult mental cases is omitted, however, and although it is not entirely clear from reading the Act that offenses against children by their parents or legal custodians are omitted, the Supreme Court of Rhode Island has so held.

In the area of adult jurisdiction New York reveals some wide gaps. Actions for separation, annulment and divorce are all handled in the supreme court; commitment of mentally ill or defective adults is also omitted from the family court's list. Certain truncated powers sometimes incidental to a matrimonial action are allotted to the family court in certain cases: it may have jurisdiction over child custody applications referred by the supreme court; the family court may entertain a child support order if the supreme court has failed to do so or has referred such application, or may enforce or

modify a supreme court child support order under certain conditions; the supreme court may refer to the family court a wife's application for support or the family court may order support denied in a supreme court separation action in certain circumstances; and the family court may entertain an application to enforce or modify a supreme court alimony or support order stemming from a divorce, annulment or separation action, if certain conditions prevail.

Leaving major matrimonial actions outside the family court and substituting a complex referral scheme has re-raised the old problem of multiple suits. Numerous jurisdictional disputes have occurred since the Family Court Act was passed concerning the proper forum for various aspects of matrimonial litigation...

The matrimonial area is not the only one in which New York experiences problems of jurisdiction. Unique among family courts, the New York Family Court has no jurisdiction over criminal family cases... [The] court was given jurisdiction over 'family offenses' defined as 'acts which would constitute disorderly conduct or an assault... between members of the same family or household,' but only in cases susceptible to family court conciliation processes or orders of protection and support. Cases not suited to this kind of help must be transferred to an appropriate criminal court.

Conflicts over family court versus criminal court jurisdiction have naturally arisen in New York. What kinds of cases are suited to family court procedures? Who decides the questions? Must all family offense proceedings be initiated in the criminal court and then, if appropriate, transferred to the family court? Did the legislators intend to deprive criminal courts of jurisdiction over the most serious kinds of assault? As with civil matrimonial actions, numerous lawsuits have arisen over just such jurisdictional disputes. And these problems arise more than just occasionally, since one-third of all family offense cases do not originate in the family court but are referred by other courts.

Procedural problems have arisen as well. If a family offense case is brought in the criminal court and then transferred to the family court, procedures for holding the defendant and fixing bail are fairly well outlined in the Family Court Act. A serious problem arises, however,

'[W]here the petition is made in Family Court under the non-criminal allegations specified in the statute, and the judge

later determines that it should be transferred to the criminal court. He is designated a magistrate with all of the powers of that office, specifically by the Family Court Act, and in that function can accept information, arraign the defendant, issue a warrant, and transfer the proceedings, now completely criminal in nature, to the appropriate court. Procedures in these matters vary throughout the state, in spite of the basic law and rules so that more consistent acknowledgment of certain constitutional rights of the parties should be had to avoid any question that they have been violated in the translation of a single matter from the status of criminal to civil and back to criminal. On the opposite pole, the law enforcement officers are hesitant about arresting persons for assault or disorderly conduct who might be members of the same family or same household, on the theory that under the Family Court Act, these people are not committing any criminal act since the Family Court has exclusive original jurisdiction which is civil in nature.

The jurisdictional and procedural conflicts New York still faces are precisely those that family courts are designed to end. That is another major reason why New York's family court judges are unanimously anxious to see their court merged in the supreme court. 'All relief and services which the law affords will be then available in a single high court,' they feel. Only such a measure will finally bring 'an end to fragmentation of jurisdiction affecting troubled families.' "(298)

There may be some advantage in reducing the above analysis into a general chart summarizing those proceedings that have been characterized as properly falling within the jurisdiction of state-wide Family Courts in the United States. The following areas of jurisdiction are identifiable:

Violations of federal, state, or local
law or ordinance by child under 18

Neglected or abandoned minor.....

Environment injurious to minor, or
behavior injurious to self or others....

Minor who is beyond the control of his
parent or other custodian.....

Determination of custody of minor.....

Appointment of a guardian of the person
of any minor.....

Adoption.....

Termination of legal parent-child
relationship.....

Judicial consent to marriage of a minor
when such consent is required by law....

Judicial consent to employment or enlist-
ment of a minor when such consent is
required by law.....

Commitment or treatment of a mentally
ill or defective minor.....

Interstate Compact for Juveniles.....

Contributing to juvenile delinquency.....

Offense against a child by his parent,
guardian or legal or physical custodian..

Adult deserting, abandoning, or failing
to provide support for any person in
violation of law.....

Adult charged with an offense other than
a felony, against a member of his
immediate family.....

Proceedings for support, alimony,
divorce, separation, and annulment.....

Proceedings for adjudication of paternity
of a child born out of wedlock.....

Proceedings under the Reciprocal Non-
support Act.....

Commitment of an adult alleged to be
mentally ill.....

Commitment of an adult alleged to be
mentally defective.....

The above specified areas of jurisdiction may be compared to those endorsed in the Report of The Governor's Commission on the Family, California, 1966, wherein a state-wide system of Family Courts was endorsed.⁽²⁹⁹⁾ The Report stated:

"We recommend, therefore, that the procedures for handling family problems be reconstructed, and that there be created in each county a Family Court, as a part of the existing Superior Court, which would have full jurisdiction over all matters relating to the family. These would include marriage [including consent to marry]; legal separation, declarations of nullity, and dissolution of marriage; child custody and support; alimony and the division of community property, paternity and legitimation of children; adoptions; emancipation of children; guardianships of the persons of minors and incompetent persons; approval of contracts for minors' services; relations between parent and child; matters now handled in the Juvenile Courts; and any other cases which involve the legal relationships between members of a family unit. Because the time available to the Commission precluded a thorough working out of the jurisdiction of the present Juvenile Court and the proposed Family Court, we recommend that the existing Juvenile Court Law be carried over and that the Juvenile Court function as one division of the Family Court. ... Any further revisions of the existing law must await future study" (300)

On the question of inter-spousal and familial torts and crimes and guardianships of estates, the Report further stated:

"The Commission feels that, for the time being at least, actions involving interspousal or parent-child torts and crimes should not be tried as such in the Family Court, although it is of course recognized that they are indicative of disruptive family relationships. ... Similarly, we believe that actions to establish guardianship of a minor's estate are best heard in the Probate Court, as at present." (301)

England

In attempting to define specific proceedings that might appropriately fall within the jurisdiction of a Family Court, the Law Commission (England) has stated:

"2. We have, at this stage, made a tentative and somewhat arbitrary classification of the expression 'family matters' used in our terms of reference. Our present thinking is that the expression should include: consents to marry; divorce, nullity, judicial separation and ancillary relief; presumption of death and dissolution of marriage; declarations of status (legitimacy, legitimation and validity of marriage); magistrates' matrimonial orders; maintenance during marriage; alterations of maintenance agreements; family provision on death; property disputes during marriage; occupation of the matrimonial home; wardship; guardianship; adoption; affiliation. It should not include any criminal proceedings or proceedings arising from offences by children and young persons. No view has yet been formed as to whether it should include certain other matters such as: care proceedings; summonses under the Ministry of Social Security Act 1966; torts between members of a family. This classification is by no means final and we therefore invite views on the question: What are the family matters with which a family court should deal?

3. Our provisional classification of family matters is heavily influenced by the present substantive family law and jurisdiction of the courts. It is not part of our task to consider and make recommendations on the substance of family law itself, but we must consider the function of family courts in relation to family law. We therefore do not preclude extension or limitation of our provisional classification should views change about the social purpose and scope of family law. Bearing this in mind, we must consider what is the best method of dealing with family matters. We are aware that some people believe that the courts should be excluded from the administration of the law relating to family matters or, at most, should be concerned only with such questions as property disputes or defended divorces. We therefore pose the question: To what family matters, if any, should the process of adjudication be applied?" (302)

In responding to the Law Commission's invitation to express views on the boundaries of jurisdiction of a Family Court, the Institute of Judicial Administration at the University of Birmingham has expressed the following opinions:

"15. We address ourselves to para. 2 of the paper.

The suggestion in the paper is that 'family matters' to be within the jurisdiction of the Family Court should include:

- (a) consents to marry;
- (b) divorce, nullity, judicial separation and ancillary relief;
- (c) presumption of death and dissolution of marriage;
- (d) declaration of status (legitimacy, legitimation and validity of marriage);
- (e) magistrates' matrimonial orders;
- (f) maintenance during marriage;
- (g) alterations of maintenance agreements;
- (h) family provision on death;
- (i) property disputes during marriage;
- (j) occupation of the matrimonial home;
- (k) wardship;
- (l) guardianship;
- (m) adoption;
- (n) affiliation.

Except in one particular (see para. 18), we are entirely in agreement that all the above matters should be within the jurisdiction of the family court. We feel, however, that this classification is insufficiently wide.

16. (a) First, we should like assurance that in either (k) (wardship) or (l) guardianship is included an application for habeas corpus, brought by a parent or stranger to obtain the custody of the child.

(b) We should also like to feel that questions relating to parental rights and duties - that bundle of obligations and privileges classified in civil law as the patria potestas - are included. For instance, a dispute on the education of a child, and indeed an action or summons under the Education Acts, should be within the family court's jurisdiction.

(c) We feel that questions arising out of a promise to marry - insofar as these have been retained by the Law Reform (Miscellaneous Provisions) Act 1970 - should also be included.

(d) We think that all questions relating to State intervention in the parent/child relationship should be included. This would embrace questions of the return by the local authority to natural parents of children in foster-care and institutions. We are indeed concerned by the apparently limitless discretion of local authorities to terminate foster care, and suggest that an order of court ought to be required by the local authority. Again, the family court should be seised of this question.

(e) We assume that (d) 'declaration of status', includes questions of recognition of foreign decrees of divorce and nullity. We feel they should be included. Moreover, we feel that questions of recognition of foreign decrees relating to any of the matters of which the family court has municipal jurisdiction should be included.

(f) Likewise, we think that enforcement of foreign decrees or orders (and, indeed, of English decrees or orders) should be made through the family court. Thus, foreign affiliation or matrimonial maintenance orders should be registrable and enforceable.

(g) We think that all questions relating to capacity to marry or formalities of marriage ought to be within the court's jurisdiction (save, of course, the routine questions of form easily resolved by superintendent registrars).

17. On the other hand, we doubt whether (h) family provision on death should be included. This is not ejusdem generis with the other matters. For, alone, this matter does not concern the on-going or future well-being of a disrupted family. Applications for family provision are in essence succession or probate questions, and have little in common with the essentially personal or human characteristics, which we think it ought to be emphasized, dominate the other topics. We suggest that this jurisdiction be left where it is.

18. We should prefer in place of (g) 'alterations of maintenance agreements', the phrase 'variation of maintenance agreements'. We assume that this phrase covers variation of affiliation agreements.

19. Subject to these caveats, we think that the family court should have jurisdiction over the matters specified in para. 15 supra.

20. The Working Party next suggests that the jurisdiction should not include 'any criminal proceedings or proceedings arising from offences by children and young persons'. Whether to include so-called juvenile crime has been a contentious issue in the U.S.A. Some family courts do include it, others do not. The issue has been revived following recent U.S. Supreme Court decisions holding that due process of law was being violated in some juvenile courts. The Working Party does not state why it is committed to the view that such matters should not be within the family courts' jurisdiction. It is possible that the American jurisprudence has influenced it. There appear, on the other hand, to be several arguments in favour of such inclusion, and we suggest that the Working Party gives them attention before committing itself to a final view.

(i) There is no equivalent in England to the 'due process' clauses in American federal and state constitutions. It is perhaps awkward to have to advance in the mother country of the common law the argument that the rigorous adherence to 'due process' in the U.S.A. may have done more harm than good. But it is certainly seriously debatable whether In Re Gault (1967) 387 U.S.1 is a progressive decision.

(ii) The Working Party has left open the question whether 'care proceedings' should be included. Our own view is that they should. (See para. 22). But it would be anomalous if care proceedings were distinguished from 'criminal

proceedings' when, after all, the whole purpose of the Children and Young Persons Act 1969 was to de-emphasize the element of criminality in juvenile misconduct and have regard to the future welfare of the child.

(iii) Much juvenile crime has its roots in familial strife. The identification of a family in distress and an attempt to remedy the situation could be a major function of the family court. The appreciation that the crime committed by a young member of a family is part of a 'total family problem' seems to place juvenile delinquency firmly within the ambit and spirit of the proposed family court.

21. The Working Party invites comments on whether the following should be included:

- (a) care proceedings;
- (b) summonses under the Ministry of Social Security Act 1966;
- (c) torts between members of a family.

22. As to (a) care proceedings, we think the case for inclusion is incontrovertible. Such proceedings have an overwhelming 'familial' character, and should no longer be heard in a Court which still retains a certain 'police court' image (see L. Neville Brown, The Legal Background to the Family Court, [1966] Brit. J. of Criminology, 139, 143).

As to (b), we think that summonses under the Ministry of Social Security Act should be included.

As to (c), torts in the family, we feel that there should not be a general jurisdiction over these. It is well known that in tortious actions between members of the family, the real dispute is usually with an insurance company. Indeed, it was to enable, say, the wife passenger to claim from the insurance company of the negligent husband-driver that the common law 'unity of spouses' was abrogated in 1962. Even the very rare case of a true tortious action between husband and wife would, we think, most usually be an action in negligence, which would seem to contain no special characteristics that would justify its removal from the ordinary common law courts. This seems also to be true of actions brought by a child against his parent.

Perhaps jurisdiction could be vested in the family court over the occasional case which concerns a genuinely inter-spousal dispute, but this would seem to be so rare that it hardly seems worth the trouble of drafting what would be complicated legislation to cover it. It should also perhaps be pointed out that the court has power to stay an action if it appears that no substantial benefit would accrue to either party from the continuance of the proceedings. (Law Reform (Husband and Wife) Act 1962 s.1 (2)(a)). Without having any knowledge on how frequently this power is exercised, we should have thought that it would be only in a rare case that continuation of a tortious dispute of a personal nature could be of benefit

to any member of an on-going family.

23. The Working Party (para. 3) invites submissions on this question:

'To what family matters, if any, should the process of adjudication be applied?'

We think this raises the question whether the courts, or some other arbiters, such as a family council, or a panel of behavioural scientists, ought to have cognizance of at least some family matters. We think that the case for retention of courts is unanswerable. Ultimately, all the matters within the family court's suggested jurisdiction lead to the need for a decision. We think there is no evidence that there exist bodies better equipped to perform this function than 'courts'." (303)

Canada

In determining the ambit of jurisdiction of a proposed unified Family Court for the Province of Alberta, the Institute of Law Research and Reform provided a general, but somewhat traditional and restrictive, definition of "family law". The Working Paper stated:

"'Family Law' for the purposes of this paper is that body of law which relates in whole or in part to the basic social group husband, wife and children. Family Law is distinguished from other branches of law because the legal controversy involved in Family Law arises out of the status and relationships of the individuals as members of the family unit. Family Law therefore includes the law relating to:

- (1) the formation, annulment and dissolution of marriage;
- (2) the respective rights and obligations of husband and wife;
- (3) declarations as to status, including declarations as to legitimacy;
- (4) judicial separation;
- (5) alimony, maintenance and the disposition of family property;
- (6) child custody, access and support;
- (7) criminal charges which arise from a family dispute, such as husband-wife assaults, threats, non-support, and liquor complaints;
- (8) neglected children, wardship and guardianship of children and adoption;

- (9) affiliation proceedings;
- (10) matters arising from juvenile delinquency;
- (11) matters relating to school attendance." (304)

Subsequently, the Working Paper recommends that the following matters fall within the jurisdiction of the unified Family Court:

"Divorce

Nullity of Marriage

Judicial Separation

Restitution of Conjugal Rights

Loss of Consortium

Injunction re Matrimonial Property

Other Actions re Matrimonial Property

Jactitation of Marriage

Declaration of Status including

Declaration of Legitimacy

Alimony or Inter-spousal Maintenance

Protection Order - Maintenance for
Deserted Wife

Maintenance of Children

Custody, Access

Interim Corollary Relief

Enforcement of Alimony or Maintenance
Orders

Reciprocal Enforcement of Alimony or
Maintenance Orders

Charges under C.C.C.

Charges under Provincial Legislation

Juvenile Offences

Committal Powers

Neglected Children

Temporary Wardship

Permanent Wardship

Guardianship of the Person

Guardianship of the Property

Adoption

Affiliation Proceedings" (305)

In a Working Paper on the Establishment of a Family Court in the Province of Quebec, no attempt was made to define the terms "family" or "family law". Instead, the boundaries of jurisdiction of the proposed unified Family Court were specifically designated. The Working Paper reads as follows:

"Recommendation # 1:

The Committee recommends the establishment of an integrated family and child court having original jurisdiction in matters of family law, comprising two main divisions: the family division and the child division.

Recommendation # 2:

The Committee recommends that the family division be granted jurisdiction in the following matters:

I - Private Family Law:

(a) Relations Between Spouses:

- marriage,
- separation from bed and board,
- divorce,
- annulment of marriage,
- conciliation proceedings in cases of divorce or separation from bed and board, prior or subsequent to such recourses,
- maintenance,
- Reciprocal Enforcement of Maintenance Orders Act [R.S.Q., 1964, c.33],
- dissolution of the matrimonial regime,
- judicial separation of property
- protection of family residence
- change of matrimonial regime

(b) Relations between Parents and Children:

- disavowal and declaration of paternity,
- maintenance on acknowledgement of paternity,
- custody of children,

- duty of maintenance toward children,
- parental authority,
- judicial dispensation from marriageable age,
- tutorship,
- adoption,
- lying-in expenses.

(c) Other matters:

- protection of incapable majors,
- relations between common law spouses,
- mental patients protection [see Mental Patients Protection Act, 1972, Bill 46, assented to June, 30, 1972],
- any other matters that might be assigned by special acts to the family and child court.

II - Offences Against the Family or Child:

- non-support [R.S.C., 1970, c. C-34, s.197],
- incest [Ibid, s. 150].
- sexual intercourse with stepdaughter or foster daughter [Ibid, s. 153],
- father, mother or guardian procuring defilement [Ibid, s. 166],
- corruption or children endangering their morals [Ibid, s. 168],
- abandonment of a child [Ibid, s.200],
- assault between husband and wife or parents and children [Ibid, ss.244 and 245],
- abduction of female under sixteen [Ibid, s.249],
- abduction of child under fourteen [Ibid, s.250],
- theft by spouse while living apart [Ibid, s. 289(2)].

Recommendation # 3:

The Committee recommends that the child division be granted jurisdiction in the following matters:

- Juvenile Delinquents Act [R.S.C., 1970, c.J-3],
- Youth Protection Act [R.S.Q., 1964, c.220],
- Education Act [R.S.Q., 1964, c. 235, s.272 et. seq.],
- Public Health Protection Act [Bill 30, assented to December 21, 1972],
- Immigrant Children Act [R.S.Q., 1964, c.219],

- Habeas corpus to recover custody of a minor child [C.C.P., art. 851],
- Liquor Permit Control Commission Act [S.Q., 1971, c.19, s.123].
- infringements of provincial laws or municipal laws committed by children of less than eighteen years of age [R.S.Q., 1964, c.20, s.106, as mod. by S.Q., 1966, c. 7, s.6],
- Act to restrain the use of tobacco by young persons [R.S.C., 1970, c.T-9].

Recommendation # 4:

The Committee recommends that indictable offences involving members of the same family or symptomatic of psycho-social and mainly family problems which, if under the jurisdiction of the family and child court, could be dealt with in such a way as to prevent deterioration of the family situation or remedy it by suitable measures, be placed under the jurisdiction of the family and child court.

[On the basis of these criteria, the committee considers that sections 150 (incest), 153 (sexual intercourse with step-daughter or foster daughter), 166, (father, mother or guardian procuring defilement), 168 (corruption of children endangering their morals), 197 (non-support), 200 (abandonment of a child), 224 and 245 (assault between husband and wife and parents and children), 249 (abduction of female under sixteen), 250 (abduction of child under fourteen) and 289 (2) (theft by spouse while living apart) should be under the jurisdiction of the Family and Child Court.

The Committee considers, however, that cases of abduction of children should not be heard by the Family and Child court unless the problem is mainly a family one, as when one parent takes away a child in the custody of the other.]

Recommendation # 5:

The Committee recommends that section 168 of the Criminal Code (corruption of children endangering their morals) be repealed.

[This provision can prevent the placing of children which might be to their advantage.]

Recommendation # 6:

The Committee recommends that the offence in regard to non-support be removed from the Criminal Code and be considered only a civil offence.

Recommendation # 7:

The Committee recommends that the Code of Civil Procedure be so amended as to place habeas corpus concerning a minor deprived of his liberty under the exclusive jurisdiction of the family and child court.

Recommendation # 8:

The Committee recommends that the family and child court be empowered to refer certain cases of juvenile delinquency to the ordinary courts in accordance with the criteria set out in the Juvenile Delinquents Act, as well as cases of indictable offences it would be entitled to hear, when the seriousness of the offence justifies it or the court considers that it cannot deal adequately with the case with the means at its disposal." (306)

Proposed Boundaries of Jurisdiction for Family Courts in Canada

It is submitted that the following areas, which have been traditionally characterized as pertaining to family law, should fall within the exclusive jurisdiction of a unified Family Court:

1. Formation of marriage, e.g. consents to marry.
2. Dissolution of marriage (divorce and nullity).
3. Judicial separation and separation orders.
4. Restitution of conjugal rights.
5. Jactitation of marriage.
6. Declarations of status (marriage, legitimacy, legitimation).
7. Alimony and maintenance (including enforcement)
8. Maintenance agreements (including affiliation agreements)
9. Actions re matrimonial property (injunctions, partition, and settlements).

10. Custody and access (including habeas corpus petitions).
11. Adoption.
12. Guardianship of the person.
13. Affiliation.

Opinions may vary concerning the question whether the jurisdiction of the Family Court should extend to the following areas:

Civil

1. Breach of promise of marriage.
2. Inter-spousal and familial torts.
3. Actions for loss of consortium (compare intentional and negligent invasion of consortium).
4. Guardianship of property (minors). (307)
5. Change of name on dissolution of marital status.
6. Provision for family dependants on death.

Criminal

1. Inter-spousal or familial offences. (308)
2. Contributing to juvenile delinquency.
3. Juvenile Delinquency. (309)
4. Neglected children; school attendance. (310)

Mentally Ill

1. Commitment and treatment of mentally ill or mentally defective minors. (311)
2. Commitment of adults alleged to be mentally ill or mentally defective.

Welfare Benefits

1. Welfare payments; recourse against family member; prosecution for abuse. (312)

Abortion, (313) Sterilization, Artificial Insemination, Psycho-surgery, etc.

1. Inter-spousal or familial disputes re above.

The decision to include or exclude the aforementioned "borderline" areas will substantially depend upon a characterization of the nature and role of the Family Court. Reports and studies have usually neglected to define the specific reasons for any particular allocation of jurisdiction, particularly with respect to those areas falling under the headings, Civil; Mentally Ill; Welfare Benefits; Abortion, etc. There is, however, a substantial body of literature expressing diverse views on the question whether specified criminal offences and juvenile delinquency should be included within the ambit of jurisdiction of a Family Court. It may be helpful to refer to source material in this context. H.A. Finlay has summarized the basic dilemma in the following comments:

"Many questions remain that have not been discussed here. One such question relates to the form that family courts should take and how comprehensive they should be. Should one take a 'wide' or a 'narrow' view of their scope? Some would favour the inclusion of a juvenile court jurisdiction on the ground that the problems encountered in that jurisdiction are frequently also encountered in relation to divorce and other matrimonial causes. The knowledge of these problems and their causes should therefore, it is argued, be at the disposal of the judges and social workers who will staff the family court in the various aspects of its work and whose expertise should be available to deal with all related problems. Against that view it may be argued that the problems dealt with in relation to juvenile offenders on the one hand, and to marriage breakdown on the other are sufficiently disparate to justify their separation, though there is no reason why the knowledge that was gained in a case arising in one jurisdiction should not be made available, if it is admissible, in a related case in the other jurisdiction.

There are after all other considerations involved, such as the protection of interests of persons accused of offences—even those of juveniles dealt with in juvenile courts—which, one would have thought, would still require the retention of a greater degree of adherence to existing procedures than is desirable in relation to divorce. Another consideration that may militate against public acceptance of a family court with which a juvenile court is closely associated could be the flavour of a criminal jurisdiction that such an association would tend to give it. Such a flavour could damage the 'image' of a family court and deter many from resorting to it. But whatever decision is made, the details of such a scheme are a matter that will have to be worked out by the Commonwealth Attorney-General and his Department. It is to be hoped that in this he will have the assistance of the State Attorneys-General." (314)

A detailed analysis of the extent to which Juvenile and Family Courts in Canada should exercise jurisdiction over criminal offences committed by adults is set out in the Report on Juvenile Delinquency in Canada, wherein it is stated:

367. The Committee has received a number of recommendations to the effect that the juvenile court should be given jurisdiction over certain designated Criminal Code offences committed by adults in circumstances where (a) the offence is one in which a child is the victim, and (b) the offence is committed by one adult member of a family against another and a child is affected because he is a member of the family. Some suggest that the juvenile court should be given exclusive original jurisdiction over such cases. Others say that jurisdiction should be concurrent with that of the ordinary criminal courts, with a discretion left⁽³¹⁵⁾ to the crown attorney as to the method of proceeding.

Specifically, the following sections of the Criminal Code have been mentioned: section [166] (parent or guardian procuring defilement of a female child); section [167] (householder permitting defilement); section [168] (corrupting children); section [197] (failure to provide necessities where there is a child in the family); and section [245] (common assault), where the assault is by one member of a family on another and there is a child in the family. In supporting such an extension of the jurisdiction of the juvenile court, the Canadian Corrections Association submission states: 'The aim....is to make it possible in those instances where it seems possible to rebuild the family to have the case heard in the more hopeful atmosphere of the children's court.Those provinces that have family courts will no doubt provide that some of these charges be laid there.'

368. This question was the subject of some comment by the Ingleby Committee. It had been suggested that juvenile courts in England should be given jurisdiction to try adults charged with cruelty to, neglect of, or some sexual offences against children, with the juvenile court having the power to commit to a higher court for trial in more serious cases and the accused himself having the right to elect trial in a higher court. As the Committee explained: 'The object....would be to ensure that proceedings in which the welfare of a child might depend on the court's decision should take place before a court accustomed to dealing with children. A secondary consideration would be that in many of these cases a child has to give evidence.' The Ingleby Committee rejected the proposal on the following grounds:

'If these were sufficient reasons for the change they would justify bringing a great many other categories of case before the juvenile court....It would not be practicable to carry this suggestion to its logical conclusion, and those who make it seem to have forgotten or mistaken the object of juvenile courts. It is to enable children to be dealt with separately from adults in courts where -

- (a) the magistrates are "specially qualified for dealing with juvenile cases";
- (b) the procedure is specially modified to suit children coming before the court;
- (c) there are restrictions on the time and place at which the court may be held and the persons who may be present at a sitting; and
- (d) there are restrictions on newspaper reports of the proceedings.

In general it would, we think, be retrograde to have adults and juveniles being dealt with again by the same courts.'

369. In notable contrast to the point of view expressed by the Ingleby Committee is the position taken in the American publication Standards for Specialized Courts Dealing with Children - a position which is essentially that adopted in the 1959 edition of the Standard Juvenile Court Act. Provision for an offence of contributing to delinquency, the means whereby juvenile courts in the United States have traditionally secured jurisdiction over offences

committed by adults, is expressly rejected in both of these American reviews of juvenile court legislation. (316) However, a basis for juvenile court jurisdiction over adults is developed in the Standards by reference to the following considerations:

'It would seem wise to allow the court jurisdiction over adults charged with actions against children where there is a continuing relationship between the adult so charged and the child before the court. If jurisdiction over both adult and child is not placed in the same court, the specialized court may decide that the child should continue to live in his own home on probation, or that protective supervision in the home is necessary, only to find that the other court has removed the parent from the home, or disposition in the child's case may have to wait on a long drawn-out procedure in the other court. There are other situations where an adult having a continuing relationship with a child may be charged with a criminal offense against the child yet no petition is filed to bring the child within the jurisdiction of the court; for example, where a father has molested his child....These situations involve intense personal relations of parent and child and are better handled in a court equipped to understand and take into account factors in such a relationship.

Such reasons do not hold in the case of an offense against a child by an unrelated adult, or an adult who does not have a continuing relationship with the child. Many courts have obtained jurisdiction in such cases under the theory that greater protection can be afforded the child if the case is heard in the specialized court. This theory does not seem sufficient justification to bring all such cases into the specialized court....' (317)

370. Still another approach to the matter of juvenile or family court jurisdiction over offences committed by adults is the scheme developed under the Family Court Act of New York State. (318) The New York statute gives jurisdiction to the family court over 'any proceeding concerning acts which would constitute disorderly conduct or an assault between spouses or between parent and child or between members of the same family or household.' Any criminal complaint involving disorderly conduct or assault between such persons must be transferred by the originating criminal court to the family court, unless it is withdrawn within three days. (319) A serious case may be transferred at once if the local judge believes that it will be returned to him and he wishes to initiate the proper criminal procedures as soon as possible. The family court may, in its discretion and where family court procedures seem inappropriate, transfer a case to the criminal court. Where a case is considered appropriate for the family court approach, the matter is not dealt with as a criminal offence at all. Instead, a proceeding is instituted by the filing of a petition alleging the acts constituting the offence and praying for an order of protection or conciliation. As one commentator explains: 'It is the intention of the Legislature to remove from the problems of family relationships the stigma of criminal charges, handling and disposition. It was considered unrealistic to burden a defendant with a criminal record of arrest and conviction of misdemeanors, even felonies, when the intention of all parties was mainly to secure proper support, or restore peace to a family.'

371. Under the New York plan, a petition to commence proceedings in the family court may be brought by the aggrieved person, by any other member of the household, by a duly authorized agency, by a peace officer, or on the court's own motion. Where proceedings are brought initially in the family court, the prayer may

be dealt with by the probation service and intake department in an attempt to solve the problem by adjustment, or it may be made subject to a formal hearing. Any petitioner may, however, insist upon access directly to the court. If a court proceeding ensues the court may dismiss the petition if it concludes that the court's aid is not required. Alternatively, the court may suspend judgment for not more than six months, or place the respondent on probation for not more than one year, or make an order of protection. Such orders of protection may include the following: (a) that the respondent shall stay away from the home, the other spouse or the child; (b) that he or she shall abstain from offensive conduct against the child or against the other parent or against any person to whom custody of the child is awarded; (c) that he or she shall give proper attention to the care of the home; and (d) that he or she shall refrain from acts of commission or omission that tend to make the home not a proper place for the child.

372. It would seem that the New York statute and the Standard Juvenile Court Act differ in the emphasis that they place upon two competing considerations. The New York Act accepts the principle that criminal proceedings should, for the most part, be excluded from the family court, and since the legislature is obviously not prepared to discontinue the institution of criminal proceedings against adults in such cases, New York law allows a wide range of proceedings to be brought against adults, including parents, in the ordinary criminal courts. Moreover, the offence of contributing to delinquency is retained in the law and continues to apply to adult family members who have committed acts that may have contributed to the delinquency of a child in the family. The family offence provisions do not apply to charges of contributing to delinquency. In contrast, the Standard Juvenile Court Act lays greater emphasis upon the need for bringing together in one court all matters involving a continuing relationship within the family. With this objective in mind, it follows that it is regarded as acceptable to have some criminal proceedings against adults heard in the juvenile or family court. Consequently, 'exclusive original jurisdiction' would be conferred

by the Standard Act upon the juvenile court over, inter alia, 'any offense committed against a child by his parent or guardian or by any other adult having his legal or physical custody.' This is subject to the right of the juvenile court and the accused to have the matter transferred to the ordinary courts.

373. In our view means should be available for bringing before a juvenile or family court, on one basis or another, certain less serious offences committed by adults involving family relationships. We would emphasize that any such extension of the jurisdiction of the juvenile and family courts makes it all the more important that highly qualified judges be appointed. Specifically, we make the following suggestions for changes in federal legislation relating to juvenile and family court jurisdiction over offences committed by adults:

- (1) The juvenile or family court should have jurisdiction over certain designated offences committed in circumstances where (a) a child is the victim of an offence and there is a continuing relationship between the child and the adult charged, or (b) the offence has been committed by one member of a family or household against another and a child is substantially affected by the proceedings. The jurisdiction of the juvenile or family court should be determined, not by any such formula itself — as it is, for example, under the Standard Juvenile Court Act — but by a statutory listing of the offences and circumstances that are contemplated. It is not our intention, in other words, to suggest that more serious offences, such as incest, should be brought

within the jurisdiction of these courts because of the continuing relationship with the child that is involved. (320)

- (2) The juvenile or family court should, so far as practicable, have exclusive original jurisdiction in the situations designated. We think that this is preferable to giving concurrent original jurisdiction to the ordinary criminal courts. Many cases are disposed of on pleas of guilty. For this reason, and also in the interest of consistency in the administration of the law, we think it best that in every such case the matter should go first to the juvenile or family court.
- (3) For reasons that we have suggested in discussing the offence of contributing to delinquency, we think that the accused should be entitled to an election as to whether he wishes to be tried by the juvenile or family court or to have the matter transferred to the ordinary criminal courts. Similarly, the juvenile or family court should itself have the power to transfer any case to the ordinary criminal courts. (321)
- (4) The Criminal Code should be reviewed to determine what offences might, in the circumstances we have suggested, appropriately be dealt with in the juvenile or family court. In addition to the offences listed in paragraph 363, these courts might be given jurisdiction, for example, in certain cases of abduction under sections

[249] and [250] of the Criminal Code. We have in mind situations such as youthful elopements and abduction by a parent who has lost the legal right to custody. Moreover, with the increasing tendency in Canada to establish family courts, it may be desirable to assign certain offences to these courts quite apart from any child being involved at all. An example would be proceedings by a spouse under the Criminal Code to have the other spouse bound over to keep the peace.

- (5) The juvenile or family court should have the power to dispose of appropriate cases by entering an order for the absolute or conditional discharge of an offender. Whatever may be said of the absolute or conditional discharge as part of a general system of sentencing, we think that such methods of disposition are particularly suitable in dealing with many offences committed by one member of a family or household against another. We would also suggest that, in connection with any amendment to the law authorizing the conditional discharge of offenders, consideration should be given to incorporating specific statutory conditions along the lines that we have previously noted.

374. In addition to the proposals outlined above, we recommend that the system adopted in the State of New York be studied with a view to assessing its suitability for introduction into Canada. We recognize that a legislative scheme of this kind cannot be implemented by federal legislation alone. Presumably it would be necessary for the Attorney General of Canada to take up with the appropriate provincial authorities

the question as to whether the Criminal Code should be amended so as to permit any province that chooses to do so to adopt a procedure designed to keep problems of family relationships out of the criminal courts. A province may, for example, wish to require a period of delay before criminal proceedings can be instituted by one member of a family against another in order that there can be sufficient time for informal adjustment or procedures of a civil nature to have their effect. Having regard to the constitutional difficulties that are involved and to the fact that little is known as yet concerning the effectiveness of the New York system, we have contented ourselves with recommending that this matter receive study as part of the development of criminal law policy in Canada." (322)

Addressing its attention to the specific offence of contributing to delinquency, the Report on Juvenile Delinquency in Canada concluded that the "offence of 'contributing to delinquency' should be abolished and, to the extent that such a change in the law would leave situations for which penal sanctions are required, Parliament should make provision in the Criminal Code for one or more new offences defined with a degree of precision consistent with accepted principles of criminal jurisprudence. (323)

The Report on Juvenile Delinquency in Canada does not examine the desirability or feasibility of unified Family Courts exercising jurisdiction over juvenile delinquency. The Report does, however, examine the inter-relationship of Juvenile Court proceedings and criminal proceedings involving young offenders. The Report formulates the following conclusions and recommendations respecting the ambit of the jurisdiction of Juvenile Courts and the corollary issues of waiver and transfer of jurisdiction:

"14. Where practicable, juvenile traffic cases, excepting perhaps those that do not involve operation of a vehicle, should be heard in the juvenile court. (324) The Act should make provision, however, for the transfer in appropriate circumstances of certain classes of cases to the jurisdiction of the ordinary courts. The disposition provisions of the Act should be altered to indicate more specifically the powers of the juvenile court judge in juvenile traffic cases. The Act should also authorize the juvenile court judge, through rules of court, to make special arrangements (i.e., separate hearings by a designated officer, dispensing with written notice to parents, etc.) for dealing with more routine kinds of traffic cases (para. 154).

16. The Juvenile court should be permitted to waive jurisdiction in favour of the adult court only where there is a specific finding that the young person concerned is not subject to committal to an institution for the mentally deficient or mentally ill, that he is not suitable for treatment in any available institution or facility designed for the care and treatment of young persons, or that the safety of the community requires that the offender continue under restraint for a period longer than the juvenile court is authorized to order. The decision whether or not to waive jurisdiction in the sense contemplated by the existing provisions of the Act should rest exclusively with the juvenile court judge (para. 168).

17. The law should also provide, by way of a supplemental procedure to the present provisions relating to waiver of jurisdiction, (325) that a case can be referred from the juvenile court to the ordinary courts for trial and, on proof of the allegations against the young person, the case will then be remanded to the juvenile court for disposition. A young person charged with an offence, or the Crown, should have the right to insist upon trial in the ordinary courts under this new procedure (paras. 168, 169, 171).

18. The Act should be amended to remove the requirement that waiver of jurisdiction by the juvenile court is possible only where the alleged offence is indictable, and waiver of jurisdiction should be permitted in any case where the accused is over the age of 14 years and the allegation is one that would, if proved, support a finding that he is a young offender (para. 173).

19. The law should provide that when the juvenile court judge is satisfied on the evidence taken at the waiver hearing that there is a reasonably strong case against the young person, he may order any social investigation or medical, psychological or psychiatric examination that he feels is necessary or desirable (para. 174).

20. More adequate controls should be written into the waiver provisions of the law to guide and limit juvenile court judges in the exercise of their discretion concerning waiver. The legislation should provide specifically that

- (a) waiver may be ordered only after a full investigation into the background of the accused and the circumstances of the offence;
- (b) the juvenile court judge is required to give written reasons for his decision and to forward them to the criminal court with the order transferring jurisdiction; and
- (c) notice of a waiver hearing must be served on the parent or guardian of the young person (para. 175).

21. The provision in the Act that permits a juvenile court judge to find a child delinquent, deal with him in any of the ways provided for by the disposition provisions of the Act, and subsequently, in the exercise of a supervisory jurisdiction continuing until the age of 21, causes him to be brought back before the court for further disposition, should be removed (para. 176).

22. Proposals for a procedure whereby offenders one year older than the upper age limit of juvenile court jurisdiction established under the Act might, in appropriate cases, be referred to the juvenile court by the ordinary criminal courts, should be studied with a view to adopting some such procedure as a means of achieving more flexibility in dealing with offenders who are only slightly over the juvenile age otherwise provided by law (para. 179)." (326)

Four general observations may be made respecting the above analysis.

1. Following the pattern recommended in the Quebec Working Paper, supra, the statutory designation of specific areas of jurisdiction should supplement a general statutory provision conferring jurisdiction over "matters of family law" upon the Family Court. Such a provision is essential in order to provide some degree of flexibility, whereby unforeseen and future problems that are identifiable as "familial" in character may fall within the ambit of jurisdiction of the Family Court without further recourse to the legislature. For example, matters pertaining to abortion, sterilization, artificial insemination and ovum transplants may well be appropriate for adjudication or disposition in the Family Court if inter-spousal or familial conflicts are directly in issue. The combination of a general statutory formula

and statutory designated areas of particular jurisdiction does not preclude, and may re-enforce, the need to develop additional statutory guidelines to facilitate the transfer of particular proceedings or issues between the Family Court and other courts.

2. To avoid any possibility of misconstruction, it should be emphasized that any decisions taken respecting designated areas of jurisdiction of the Family Court do not imply that all such areas involve similar procedures, or, conversely, that independent proceedings must be instituted in respect of each designated area of jurisdiction.

3. Subject to qualification in the context of juvenile delinquency, traditional rules and criteria for determining the jurisdiction of Family Courts have been substantially premised upon the subject matter in dispute, i.e., jurisdiction has been vested in the Family Court ratione materiae. Consideration should be given to the question whether jurisdiction can be or should be defined on the basis of the persons involved in the dispute, i.e. jurisdiction ratione personae. The reason why such emphasis has been placed upon the "res" rather than the "persona" is in all probability attributable to the inherent difficulty of defining the "family" or perhaps the traditional adherence to the concept of the monogamous marriage as the foundation of family laws. This concept has not been seriously questioned in the past, at least in the formulation of state policies , and the emergence or, perhaps, acceptance of "new" life styles may evince a need to re-evaluate jurisdictional criteria ratione personae. (327)

4. The suggested lists of proceedings that might fall within the competence of the Family Court essentially reflect the traditional boundaries of family law, which are premised upon the breakdown of marriage and the consequential need to resolve competing and conflicting individual claims. Undue emphasis upon the "pathological" family distorts the potential contribution that might be made by Family Courts in proffering assistance to on-going marriages or engaging in programmes designed to prevent marriage breakdown or familial disruption. This subject merits more detailed consideration.

Assistance to on-going marriages; counselling, conciliation and preventive programmes.

In responding to the Paper prepared by the Family Courts Working Party of the Law Commission, the Institute of Judicial Administration at the University of Birmingham stated:

"33. Finally, we should like to raise again the question of whether the family courts ought to be concerned to help on-going marriages. We realise that such a reform of family law and practice raises controversial issues, and may possibly promote dissent from those who otherwise would support the establishment of family courts. This paragraph is intended to stand apart from the remainder of our submission. It is quite possible not to favour these suggestions and still to support the establishment of family courts.

We do, however, feel that the opportunity presents itself to revise the notion that family courts (and family law itself) is concerned only with family breakdown.

Should family law be concerned with helping on-going marriages? In common law countries, traditionally the law has only stepped in when

the family is breaking or has broken down. But there are precedents in European countries of a much bolder approach. Thus the German Vormundsgericht (Guardianship Court) is available to adjudicate on problems which parents are experiencing with their children.

Likewise, in continental countries, under community property régimes, the husband or wife must obtain the consent of the court to certain transactions affecting the administration of property during the continuance of their marriage. The court is called in when there is no suggestion of a family breakdown. We therefore suggest that the Working Paper consider extending the family courts' jurisdiction:

- (a) To provide pre-marital counselling to all young persons seeking the consent of the court to marry. [On this point, it may be that the substantive law ought to be changed so as to extend the range of these persons - see Law Commission's Working Paper No. 35 on Solemnization of Marriage.]
- (b) To provide a service to parents experiencing difficulty with decisions over their children.
- (c) To provide guidance and solutions to all families with general major difficulties, or impending problems.

- (d) To assist the total welfare of families."

(328)

In determining whether the jurisdiction of the Family Court should be extended to include pre-marital counselling and post-marital family counselling or conciliation, it is relevant to advert to various opinions on these matters and to the experience in the United States.

Judge William E. MacFaden⁽³²⁹⁾ and Meyer Elkin⁽³³⁰⁾ have expressed the following opinion respecting the function of the court in the context of pre-marital counselling:

"Premarital counseling should not be a function of the court. The only exception that should be made is in those cases where the boy and girl require the consent of court to obtain a marriage license. Premarital counseling, like marriage counseling or divorce counseling, and other programs designed to strengthen family life requires a total community effort, involving all community resources.

Premarital counseling is extremely important and worthwhile as a preventive service, but the major responsibility for such a service should rest with other community resources such as the schools, churches, Family Service agencies, other community counseling agencies, as well as the private practitioners in psychiatry, psychology, social work and pastoral counseling.

The role of the court in the area of premarital counseling should be limited to providing leadership in the community to stimulate interest in such a program and to document the needs for it-but not actually to take on this service itself. At the Third Annual Conference of Conciliation Courts held at San Mateo, California in 1964, most judges and counselors in attendance were in agreement that premarital counseling should not be a function of the court." (331)

Pursuant to legislation which became effective in November, 1970⁽³³²⁾,

the Superior Courts of California are empowered to order pre-marital counselling for any couple applying to the court for consent to marry where either party is under eighteen years of age and the court deems such counselling necessary.⁽³³³⁾ This legislation was introduced as a consequence of the high rate of marriage failure arising in cases of teenage marriage. Although the Superior Court has been given the responsibility of implementing the law, the counselling service is ordinarily provided not by the court but by community counselling agencies.⁽³³⁴⁾ Such an approach appears preferable to the imposition of a responsibility on court staff to develop and implement pre-marital counselling programmes. Such a responsibility has, however, been assumed by the Conciliation Court, Maricopa County, Arizona. Thus, the 1971 Annual Report of this Court stated:

"[Pre-marital counseling] is a required step for males under 18 years of age and females under 16 years of age. Any female under 16 who is pregnant may marry the putative father of her child with Court authorization. It is recognized that this places the couple in an extremely high risk category with only statistically some 10% chance for success in the marriage.

... Premarital counseling procedures underwent a change in the past year. Due to the increased client load, the Conciliation Court shifted to a group counseling technique. Each Friday, the parents meet for one hour and the respective partners meet in a separate hour. Selectivity is based on pre-gathered data such as financial ability, an existent pregnancy, paternity, parental consent, and a 'partnership' questionnaire. The group sessions have shown the advantages of sharing ideas and emotional support in a period of stress. A disadvantage is the possible lack of freedom in a strange group

to express personal doubts and hostilities. Ways of overcoming this lack are being considered. If in the pre-existing data, evidence of difficulties surface, those principals, parents and applicants, are always seen in separate, individual sessions.

In 1971, 274 of these underage couples were referred to us. The Court approved 232 couples for marriage, and 32 couples were denied the permission to secure a marriage license. There are 10 active cases now pending that will be completed in 1972.

The experience of the Court in this program thus far seems to indicate that there is a need for premarital counseling. A premarital pregnancy is not sufficient reason to grant consent to marriage because in most cases teen-agers are not ready for marriage. As has been the experience in other Courts in this work, it appears parental pressures for a couple to marry play a part in a large number of cases. When the teen-ager decides to marry, he is in a crisis; and experience also shows that when the decision is carried out, the teen-ager becomes overwhelmed by the emotional tribulations of marriage. Hence, a goal of the Court is to help the young couple decide their readiness for marriage, as well as to acquaint them with alternatives if they conclude they are not ready for marriage and the creation of a stable family unit." (335)

In examining proposals for pre-marital counselling in Hawaii, the Commission on Children and Youth concluded that, although such counselling is desirable, legislation requiring pre-marital counselling is not an appropriate solution:

"Pre-Marital Counseling: Based on its deliberation, the Committee concluded that pre-marital counseling is highly desirable as one of the means of increasing the stability of marriages. However, it did not believe that legislation requiring pre-marital counseling was the solution for the following reasons:

- 1) *Effectiveness of compulsory counseling is questionable.*
- 2) *There is the problem of enforcement and the cost thereof.*

The Committee believes that the lack of pre-marital counseling is a social problem in itself and that the use of counseling is a responsibility of individuals and parents. The Committee recommended that emphasis be placed upon the extension of existing pre-marital and family life programs, further development of family life and other related courses in high schools, and preparation of a brochure of available resources for pre-marital counseling." (336)

This writer is of the opinion that if legislation were enacted in Canada requiring pre-marital counselling in cases where judicial consent to marry is sought, the responsibility for providing counselling services should rest with community agencies rather than the auxiliary staff of the Family Court.

The role of the Family Court in providing marriage or family counselling and conciliation services has been previously discussed (337) and will be examined in greater detail in due course. Advocates of the concept of unified Family Courts regard the availability of counselling and conciliation services as essential to the effective operation of the Family Court. There appears to be a consensus that such services should be available but there is a wide divergence

of opinion and experience on how such services can best be provided.

Thus, Donald M. McIntyre has observed:

"There is growing recognition by legislatures and courts in this country of the desirability and feasibility of conciliating marital disputes. Except for legislative enactments in Michigan in 1919, in Wisconsin in 1933, and in California in 1939, there were no provisions in the law, until this past decade for the judiciary to assume responsibility in this field.

To accommodate persons apparently needing marriage counseling rather than divorce, formal conciliation services began to appear early in the 1950's. ... The range of activity varies from state-wide programs with enabling legislation to local innovations by court rules or practice. The processes and procedures prescribed vary widely, as to the kinds of personnel or conciliation agencies employed. Some claim great success and publish data to support it; others admittedly have had great difficulty. Some operate within and as part of the activities of a court integrating all or most family legal matters—the family court—while others are adjuncts of divorce courts only." (338)

In some jurisdictions, formal procedures are prescribed whereby litigants may lodge a petition with the court for the purpose of securing counselling or conciliation services. Such procedures were endorsed in the Draft Family Relations Act and Rules of Practice Thereunder, which was prepared by the Rules Committee, Provincial Court (Family Division), Province of Ontario. Draft Rule 9 provided;

- "9. (a) Upon the swearing of the petition, the Clerk of the Court shall appoint a 'conference officer' to assist the parties either to reconcile their difference with a view to resuming cohabitation, or in the alternative, to assist them where possible, to effect a settlement of all or some of the issues in the action.
- (b) The Clerk of the Court shall cause to be sent to both parties, by ordinary mail, an appointment to attend upon the conference officer (Form 5). However, in no case, shall the attendance date engrossed in the appointment be prior to the final day for the filing, by the defendant, of the Notice of Intent.
- (c) The conference officer shall be an officer of the Court.
- (d) The conference officer shall file with the Court, within days prior to the trial date, a report (Form 6), provided, however, the conference officer may from time to time on two days notice to either party or in the absence of the parties and with their written consent, make application to a judge to adjourn the proceedings and set a new trial date pending further attendances upon the parties. Where an order adjourning the proceedings has been granted, the judge may set such further dates for attendances upon the conference officer as may be warranted. In such case the conference officer shall file his report within days prior to the adjourned trial date.
- (e) If the parties did not appear before the judge, either personally or by counsel, at the time of the making of the adjournment order and the fixing of new dates for attendances on the conference officer, the conference officer shall forthwith, after the making of the order, deliver to the parties a notice (Form 7) advising the parties of the adjournment order and the new dates for attendances upon him.

- (f) At the trial of the action, either party shall have an opportunity prior to the hearing of the matter, to read the conference officer's report and confirm or repudiate the conference officer's report, or any part thereof.
- (g)
 - (i) The failure, without sufficient excuse, of any party to attend upon a conference officer as required in the appointment, (Form 5), or any appointment date fixed by a Judge pursuant to an adjournment order, shall be deemed to be a contempt of the Court, and the defaulting party shall be liable to a fine of not more than \$100.00 or to imprisonment for a term of not more than 14 days common gaol.
 - (ii) There shall be engrossed in the appointment which is Form 5, a notice that the person upon whom the appointment is served is required by the rules of the Court to attend upon the conference officer as set out therein, and that failure to do so, without sufficient excuse will be deemed to be a contempt of the Court, and punishable as set out in paragraph g (i).
 - (iii) No finding of contempt shall be made herein until it has been proved that the respondent has received a copy of the appointment (Form 5), or notice of appointment date fixed by a Judge pursuant to an adjournment order (Form 7). Provided that at the contempt hearing the Judge, at the commencement of the proceedings, may inquire of the party allegedly in contempt as to whether or not he or she had received the requisite appointment or notice." (339)

In New Zealand, conciliation procedures in Magistrates' Courts are contemplated by section 14 of the Domestic Proceedings Act (New Zealand), 1968, and are available irrespective of whether legal proceedings have been instituted. Thus, P.R.H. Webb has observed:

"Remedial measures at the earliest possible stages are envisaged by s.14. On application *ex parte* by any married person stating that unhappy differences have arisen between the applicant and his or her spouse and that the applicant desires to effect a reconciliation, the Court may refer the matter to a Court-appointed conciliator or to one nominated by 'an approved marriage guidance organization', i.e., one approved by the Governor-General by Order in Council: s.2. This important new 'preventive' procedure is absolutely separate from proceedings to obtain a separation order or maintenance. Indeed, it may be invoked without seeking any other remedy and simply because breakdown threatens." (340)

Although it is inappropriate at this point to further examine and resolve the many issues respecting the availability of marriage and family counselling or conciliation procedures in the Family Court, it is submitted that the "jurisdiction" of the Family Court should encompass the provision of counselling and conciliation services.

SUPPORT SERVICES

General Introduction

Submissions respecting the need for auxiliary or support services to be available to or in the Family Court have been discussed in detail in previous sections of this paper. (341) In general, the writer endorses the following conclusions expressed by Judge William E. MacFaden and Meyer Elkin:

"A comprehensive...Family Court Act providing for the handling of all civil family matters within a specialized area of the court is necessary and would result in improved, more expeditious handling of such litigation. Such an Act must recognize the real function of the Courts, the lawyers and the social services, blending their expertise to save the family yet not encroach on each other's roles lest we have trials by the welfare or sociological agencies." (342)

Types of support services

The types of auxiliary or support services envisaged as being necessary to the effective operation of a Family Court are generally described in the following statement of Judge Paul W. Alexander:

"Among the specific services offered directly or by referral are medical, psychological, psychiatric, economic, educational, social casework and marriage counseling of both the non-directive and advice-guidance types. The family being a fictitious entity

like a corporation, these services are offered as needed to the individual members thereof with a view to protecting and promoting the stability of the entity." (343)

The above statement, however, is substantially confined to "therapeutic" services. A more detailed analysis of the types of services that already exist or should be available to or in the Family Court is set out in the Working Paper on Family Court, which was prepared by the Institute of Law Research and Reform, Province of Alberta. This Paper stated:

"A. In General

As well as being committed to the principle that the Family Court should be a court of law and not a social agency, we are committed to the proposition that there should be available to the Family Court and to persons who have business in it certain supportive services, administrative, social and legal. We will proceed to discuss in somewhat general terms the services which should be attached to a fully organized Family Court with a large volume of business, omitting for the moment the Juvenile Court side of the Family Court and matters relating to neglected children, wardships and adoptions. ...

B. Administrative Services

It is obvious that the Family Court, like other courts, must be well supplied with office and clerical staff. There must be receptionists to receive people, clerical staff to deal with correspondence, preparation of reasons for judgment where needed, preparation of court documents and other clerical matters. There must be staff to issue documents, attend to service of documents and look after them. There must be accounting services, particularly because of the function of the Family Court in receiving payments due under court orders.

These services do not appear to be involved in controversy or likely to give rise to it. It

seems reasonable that they should be under the direction of a clerk of the court.

C. Social Services

The existing Family Courts have developed court services of kinds not normally associated with the superior courts. These services are of kinds which would normally be expected to be rendered by persons trained in social work...The nature and extent of the services which should be provided, and the relation of these services to the court, are matters which make for differences of opinion and indeed have done so in our Board.

It is possible to classify the functions which either are or could be rendered by social work personnel as follows: intake, reconciliation, conciliation, investigation, and 'enforcement', i.e., collection of money due under court orders. We will proceed to discuss these functions.

1. Intake

Many persons who come to the Family Court are ignorant of legal procedures and would be unable to carry them through unaided. ...The Family Courts have developed what is known as an 'intake' procedure in order to enable such persons to receive assistance in coping with the procedures and in some instances to make the procedures unnecessary. ...

We believe that some such service should be available. There should be some discussion with such persons to be sure that they really wish to proceed, and there should be at least a minimum of effort to see whether there is any chance of reconciliation of the parties, or to see whether the specific issue, the amount of maintenance, or the custody of the child, can be resolved by agreement so as to make it unnecessary to have the issue resolved by the court.

We believe that there is some danger of unfairness to one or both parties. Either or both may well have been influenced to make statements contrary to interest by reason of the

fact that the counsellor is a person in apparent authority or in the belief that the statements are confidential. We will later discuss the issue of the privilege or lack of it, attaching to such information, and at this point we merely point to the danger.

We believe that there also can be a danger that if a counsellor forms the opinion that the complaint is not justified, he may give the impression that the complainant is not entitled to carry it through. The complainant, of course, has a right to have his case brought into the court and disposed of according to law and this basic legal fact should be clear to him and there should be no obstacle put in his way.

We recognize that not everyone who comes to the Family Court will want the benefit of such an intake procedure. This will be more frequently true if a Family Court is constituted with comprehensive jurisdiction in Family Law matters. Many divorce matters are commenced with legal representation on both sides and for that or other reasons the complaining party may not wish to go through the intake procedure. Since the procedure is intended to be a help, it may be declined.

2. Investigation

The intake procedure has taken our example, the deserted wife, through an initial interview. It may have taken her through a reference to an outside agency. With or without such a reference it has resulted in the completion of an affidavit and the issue and service of a summons. It may also have involved the husband through interview and discussion of either reconciliation or agreement on the specific issues of maintenance and custody. This procedure applies presently only in the existing Family Court. In the proposed Family Court there are likely to be many cases in which the parties are legally represented and in which the intake procedure may not be involved.

Upon the return of the summons, if only maintenance is involved, a denial of liability is likely to require a trial and if one party is legally represented, the matter of amount is likely to be put over for trial although if there is no request to have it put over for trial, it may be disposed of on the spot. It seems that there are varying procedures in the different Family Courts. There may be no one present but the judge and the parties in which case it seems inevitable that the procedure must be somewhat inquisitorial. There may be a court counsellor to assist the court or there may be a court solicitor to assist the court. It seems to us desirable that where the parties are not represented some person of legal training be present to assist the court so that the judge can stay out of contention.

If custody is involved, the court may again be able to deal with the matter on the spot. If however there is a serious dispute—and it should be noted that the intake procedure would have sent the matter this far only if there appeared to be a dispute—the court is likely to feel the need of some independent evidence. The interests of the children may not be understood by these parents, or the bitterness between the parents may have made them incapable of thinking properly about the children's interests and the parents may or may not have given thought as to how to present the evidence which the judge needs.

The judge will ask the parties for their consent to an investigation. Our understanding is that the consent is invariably forthcoming. It may arise from the feeling of a particular parent that he or she will inevitably be seen to be right. It may, we suspect, be given in many instances because the party feels that a refusal would prejudice him in the eyes of the court.

When an investigation is directed, the matter is adjourned and a court counsellor conducts the investigation. The investigation may be a thorough one involving inspections of the home maintained by each parent, interviews with the parents and with the children, interviews with the school, interviews with relatives and other persons whose names are given as references and so on. The investigation may also, depending upon the quality of the counsellor and his case load, be somewhat perfunctory. The investigation tends to restrict itself to facts rather than recommendations, but the facts of course must almost inevitably be put in such a way as to make one conclusion more likely than another. The counsellor's report is put before the judge to assist him in his adjudication. The counsellor is, we believe, invariably available as a witness if either party wishes to have him called, and we believe that either party **can cross-examine** even though the counsellor is called at his instance. We are certainly of the opinion that the counsellor should be available for cross-examination. We believe also that the report is made available before the hearing and we certainly believe that this should be done and that it should be done in sufficient time for the parties to assess it and deal with it at the trial.

We believe that some assistance of this kind must be available to a Family Court if it is to perform its function properly. We believe that this assistance should be available to the proposed Family Court when it deals with similar matters in divorce and other types of proceedings now dealt with in the Supreme Court. We do not propose to say that its availability should be limited to cases of custody.

We do see some very considerable dangers which cause us concern.

The first danger that we see is that information acquired in confidence from one party under circumstances of pressure or trust may be used against him at a later stage. For example, a husband who is interviewed by a counselor in the intake procedure may well think either that he must answer or that he may safely answer on a confidential basis. His answer will probably be recorded on the file. If the information stays there, and if the function of the intake counsellor ends with the preparation of the affidavit commencing proceedings, and if the file is not used later without the husband's consent, we do not see any great harm in the procedure and we believe it to be necessary. However, we can see difficulty if, as we understand to be the case in at least some Family Courts, the same counsellor follows through with the investigation and if the file is made available to the counsellor conducting the investigation, whether or not he be the same person as the intake counsellor.

We see a two-fold problem. The first is that the use of the information may be unfair to the husband and that the possibility of its use may destroy the effectiveness of the intake procedures since the party being interviewed is not likely to be frank if he knows that his answers can be used against him. The second is that he may reasonably think that the court is against him because its officer is involved and that the court has tricked him or coerced him.

On the other hand, we see strong reasons for allowing all available information to be communicated to the investigating counsellor. If he does not have all available information he must duplicate any previous investigation and there are simply not enough qualified people and there is not enough money to pay them, so that undue waste of their time

and effort in digging out material which was easily available will detract from the availability of services to the particular family and to other families. The second reason is that some important and possibly vital information that was discovered on the first investigation may not be discovered by the second investigation. This is particularly true when a file may extend over several years of contact of a family with the Family Court.

We give anxious thought to these problems and have concluded tentatively that the best resolution of the conflicting interests here is that all the information from previous files should be available to the investigating counsellor but that it should not be produced in court in any way; that is, that it should be available as a basis for the investigation but that the investigating counsellor should not refer to it in his report or in court. We have also concluded tentatively that the investigating counsellor should never be the same persons as the intake counsellor. The effect of these recommendations, we believe, would be that the information would be available as a basis of the investigation but not as evidence in itself.

There is a further question as to whether and to what extent the files should be available for inspection by the judge outside the court. There must inevitably be a feeling on the part of a conscientious judge that he should have all the background knowledge that can be made available to him before adjudicating in these very difficult areas. On the other hand we believe that the basic rules upon which our legal system is founded require that the judge hear all the facts in open court and that he see nothing that is not seen by the parties, and nothing which has not been brought to the attention of the parties so that they may have a chance to meet it. We have therefore concluded that files other than those of the investigating counsellor should not be available to the judge and that all files available to him should be available to the parties.

We are aware that this last recommendation can in a particular case give rise to very considerable difficulties. There may well be a fact in the investigating counsellor's file, or indeed his report, the communication of which may well be injurious to either party or both. One party, for example, may have admitted the commission of adultery to the investigating counsellor, and the communication of this fact may well put an end to whatever chance of reconciliation remains. Sometimes this problem is got around by communicating the fact to the solicitor for the other party with a suggestion that he should not pass it along to his client. This must inevitably put the solicitor in a most difficult position. However, recognizing these problems, we still believe that the parties are entitled to know what material is before the judge and to be able to meet it.

We note in passing that the use of reports of investigating counsellors necessarily results in the introduction of quantities of hearsay evidence. While the dangers of this practice must be recognized, we believe that some relaxation of the traditional rules of evidence is necessary in the interests of the parties, and we believe that it has to be left to the good sense of the court to decide what evidence should be allowed to come in by the way of such reports, and the weight that should be given to it.

Finally, we point to one other problem that gives us considerable concern and that is: too close an association between the court and someone who is or who appears to be an officer of the court. We believe that a litigant may well receive the impression that the relation between the court and the court counsellor is such that the report of the court counsellor carries undue weight with the judge and that the litigant is not allowed effectively to challenge it. We will take this matter up later, and it is the basic reason for the recommendation which we will make that there should be some separation of the investigative services from the court.

3. Reconciliation

There is an undoubted social interest in causing husband and wife to be reconciled in a proper case. Accordingly, there is a question whether the Family Court should provide counselling with a view to reconciliation of the parties.

Our view is that the court and the court counsellors should be alert to the possibility of reconciliation and make referrals to outside agencies if the possibility exists. We do not discount the possibility of some assistance in the direction of reconciliation, but we do not go on to recommend that the court engage in long-term marriage counselling. It appears to us that the long-term counselling facilities required for reconciliation are better located in social agencies elsewhere in the community. We say this against the background of things as they are and within the context of recommendations to be implemented within the near future in Alberta. We do not recommend against research and experimentation in short-term counselling with a view to the acquisition of experience in the field under Alberta conditions.

4. Conciliation

A function quite different from that of reconciliation is that of bringing about agreement on specific issues such as the amount of maintenance and the custody of the children. This may appropriately be termed "conciliation".

It seems to us that the court has a definite function in this field. The intake counsellor should, and we believe does, try to see that such matters are settled by agreement rather than by going to the court itself. Similarly, if the judge can bring about an agreement, it is desirable that he do so, so long as he does not appear to be exerting the pressure of his office upon a litigant. The investigating counsellor in the course of his investigation may well see an opportunity for agreement which the adversary atmosphere may have prevented from

showing itself. Again, so long as there is no coercion, it seems desirable that he promote any opportunities for agreement.

We believe that there is also room for a more formal procedure. This should be a pre-trial procedure designed to settle various issues between the parties, though not the central issue of reconciliation.

Our recommendation is that either party should be able to apply to the court for an order directing the parties to engage in the conciliation procedure. Our recommendation further is that the court of its own motion should be able to make such an order.

We believe that the court should be empowered to direct the parties to appear and engage in the conciliation process with counsellors on the court staff who might be either the intake workers or other court agency personnel. We believe that the parties should be entitled to have legal representation during these proceedings.

The primary object of such proceedings would be to facilitate the mutual negotiation and settlement of ancillary issues arising incidentally to proceedings for termination of the marital status or other marital relief. The role of lawyers would be to participate in the drafting of minutes of settlement. The role of the counsellor would be to enable the parties to come to terms with themselves by reason rather than by coercion of law. Even if the result is to cause the husband and wife to part without bitterness, or with less bitterness, the process will have been worthwhile.

5. Enforcement

The collection of money due under judgments of the superior courts is effected by

seizure and sale of assets under writ of execution, garnishee of indebtedness to the defendant including wages, and by some other specialized methods which are largely irrelevant here. These remedies are for various reasons too cumbersome and too costly when considered in relation to the collection of periodic and usually comparatively small amounts of money under orders for maintenance. The fully organized Family Courts have therefore developed mechanisms for collection.

The order when entered in the Family Court is brought to the attention of the accounting services of the court. These services receive the monthly payments. If the wife and children are supported by welfare, the payments received by the Family Court are sent to the appropriate department of the government; otherwise the payments are sent on to the wife for her own maintenance and to the person having custody for the maintenance of the children.

If a payment is not received, the default is brought to the attention of a court counsellor who tries to communicate with the husband and arrange to have the payment brought up to date. If circumstances appear to require a variation, the counsellor may recommend that an application to vary be made. If not, and if the payments continue to be in default, he will bring the matter back to the court on a summons to show cause why the husband should not be committed for contempt.

It has been suggested that the existing remedies are not sufficient to ensure proper collection. This particular suggestion is outside the scope of this particular project, but we expect to look at it in the future. At the moment our concern is to recognize the existence of the enforcement function and the necessity of having it available in the Family Court.

We should point out that orders of the Supreme Court relating to maintenance can be registered in the Family Court at the present time, but that they cannot be varied by the Family Court. We have dealt with this matter elsewhere in this paper.

D. Legal Services

1. Legal Advisers to Parties and Court Staff

We believe that provisions should be made for legal assistance for persons who come through the Family Court. Legal advice should be available. Where necessary, legal assistance and representation in court should be available.

Our opinion is that in general, it would be best that legal advice and representation come from members of the legal profession in private practice. If the person in need of advice is not able to pay, then we believe that the best arrangement is to make legal assistance available through the Legal Aid Plan. ...

Our principal recommendation, therefore, is that legal aid be made available, adequately financed and staffed, so that persons coming to the Family Court can be assured of legal advice and representation.

We believe however that it is more important that legal advice and representation be available than that it come in a particular way. Therefore, if the Legal Aid Plan is not able to supply all necessary advice and representation, we believe that lawyers should be especially provided for the purpose. We would prefer that their offices and administration be outside the Family Court itself, but if this is impracticable then they should be provided by the Family Court.

Our reasoning for preferring that lawyers acting for persons in the Family Court should

be separate from the court is that we think that the other party may reasonably feel that the court solicitor is more likely to have the ear of the judge than anyone appearing for that other party. Further, there appears to be some feeling, at least among the legal profession, that the court solicitor is something in the nature of a prosecutor. Therefore, while the paramount consideration is to have representation, we think that it should be separate from the court.

Lawyers on the court staff may well be able to assist the Family Court personnel and give initial advice to persons who come to the court.

2. Counsel for the Court

We understand that in practice in some courts a court counsellor will be present upon the return of a summons for maintenance or custody and will fulfill a function somewhat resembling that of prosecutor or counsel for the court. ... Where the parties are both represented, it does not appear to us that there is any need for a third person to present the case, but there probably is such a need upon the return of a summons for alimony and maintenance. We have not formed any firm conclusions as to whether the function is required, and as to whether it should be required to be performed by a lawyer and would invite comment.

E. Representative of Children

It is suggested from time to time that the interests of children should be separately looked after. The parents are the natural guardians, but they may well be blinded by the bitterness arising from the dispute between them and may overlook the interests of the children or may make custody a weapon to be used against each other.

[In] Family Court there is an investigation where there is a genuine dispute, the investigation being carried out by a court counsellor.

There is no similar service attached to the Supreme Court which also deals with matters of custody [but a procedure has developed informally whereby an amicus curiae may be appointed to assist the Supreme Court in determining the best interests of the child in contested custody proceedings.]

We are satisfied that this procedure has, where it has been available, satisfied an urgent and important need. We believe that a service of this kind should be available to our proposed Family Court without expense to the litigants in cases where the court, of its own motion or upon application, considers that representation is necessary in the interests of the children. We believe that the amicus curiae should be a lawyer and should have available to him whatever services are necessary. He should have the right to examine and cross-examine witnesses and he should have the right to bring cases back to the court if he has reason to believe that the child is not being properly looked after by the person to whom custody is awarded.

We believe the amicus curiae should be a lawyer and agency separate from the Family Court. His location in the office of the Public Trustee seems logical and reasonable if proper funding is provided to the Public Trustee, but he could be established in another agency if that should appear to be more practicable, so long as he is free to give independent attention to the interests of the children. It would seem to us that the assistance required by the amicus curiae from counsellors could best be afforded by the investigative services which we believe should be available to the Family Court, so long as an adequate provision is made for the additional burden involved. ...

G. Neglected Children, Wardships and Adoptions

The discussion of supportive services to this point has been in relation to matters arising between husband and wife.

In cases involving neglected children, wardships and adoptions, the present system involves the Child Welfare Branch. The Branch conducts an investigation and makes recommendations to the Family Court or the District Court as the case may be. Jurisdiction would, under our recommendations, be vested in the proposed Family Court.

We do not make any recommendation for change. If the court wishes, it should be able to have a case investigated by the investigative services available to it. Legal aid and legal services should be available if required. These would be normal adaptations of the new court structure.

H. Juveniles

In the case of juvenile courts, we also do not have any firm recommendation. Services are presently provided by municipal or provincial agencies which do not form a part of the Juvenile Court itself. We are not aware of any reason to disturb this arrangement at the present time. After the Family Court is in operation, experience may indicate that some change should be made, but we think that such experience should be awaited.

At the present time it is not clear what provision will be made with regard to juveniles. Presumably the Young Offenders Bill will be reintroduced with changes, or a substitute piece of legislature will be introduced. This uncertainty appears to be an argument against making major changes until the legal situation becomes clear." (344)

The various types of auxiliary or support services envisaged in the above analysis substantially correspond to those recommended in an earlier analysis undertaken in Ontario, wherein it is stated:

"Departments of the Court System"

For any family court system to be effective it must be supported by adequate ancillary services. ...It is recommended that the family court system should have its headquarters in Toronto. There should be branches of the various service departments of the court at county and district level throughout the Province, and the aim should provide a uniform and superior level of ancillary services throughout Ontario. It is recommended that the main service departments of the family court system should be as follows:

1. Social Work Department

This title is used to cover a variety of personnel, such as social workers, probation officers, case workers, medical officers, etc. No doubt some of these services, particularly those of a more specialized character, could be regionalized or centralized at the headquarters in Toronto with provision for regular visits and close contact with all points in Ontario at which family courts are operating. There is need here for careful thought and planning and for the development of services on a Provincial basis. Another area of importance that requires study is the functioning of inter-disciplinary teams, for example, where legal, medical and social work personnel are involved in consideration of the same problem.

All ancillary services should be departments of the family court system and should work under the general direction of the chief judge as officers of the family court system.

2. Department of the Law Guardian

The appearance of children in court raises problems of frequent occurrence and concern in a family court system. There is a wide variety of ways in which the problem can arise, for example: delinquency; children under Part II of the Child Welfare Act; custody of children; adoption of children; children as witnesses. Further, there are all ages of children involved, beginning with new-born children, in the case of adoption. Frequently, children may be too young to instruct a lawyer or to have any understanding of their legal rights; although the Legal Aid system of 'duty counsel'

(such as exists in the Metropolitan Juvenile and Family Court) is a useful contribution to this problem.

The Family Law Project has examined the system of 'law guardians', established under the Family Court Act of New York State in 1962. New York legislation contemplates that the law guardian will perform three main functions:

- (a) as an advocate, he will defend the legal and constitutional rights of the child;
- (b) as a guardian, he will take into consideration the general welfare of the child as well as his legal rights; and
- (c) as an officer of the court, the law guardian will interpret the functions of the court and its objectives to both the child and the parents, and he will work closely with the court's ancillary services to reach a good disposition of the case where that is involved and to help promote in the child and its family an acceptance and understanding of the purposes of such a disposition.

The Family Law Project recommends that a suitable adaptation of the New York law guardian scheme be introduced in Ontario and that a Department of the Law Guardian should be included in the family court system. This department should be regarded in the first instance as experimental, and its operation should be kept under review.

In the role of advocate, the law guardian would be entitled to appear on behalf of any [minor] involved in any proceedings, actual or pending, within the jurisdiction of the family court system, and he would be entitled as of right to obtain notice of any such proceedings and all relevant information, documents, reports, etc. He would have a right

of audience at any sitting of a family court concerned with such a case. He would, in effect, fulfil all the usual functions of legal counsel for his infant client. A 'mature' infant would be entitled to have his own counsel in place of an officer of the Department of Law Guardian. The law guardian would not also represent adult parents of the infant, except where there is no conflict of interest between the infant and the parents, and where he has been invited to do so. The range of cases in which he would be entitled to appear would include all those mentioned above as being within the jurisdiction of the family court system.

In the role of guardian, the Department of the Law Guardian would absorb the functions of the Official Guardian. In this connection, the Law Guardian's Department would have available to it the ancillary services attached to the court, such as probation officers, social workers, and so on. The Law Guardian's Department would also have power to employ, on an ad hoc basis, outside social workers or other personnel to carry out special functions. The Law Guardian's Department would, inter alia, receive notice of all questions involving custody of a child, adoption of a child, or a child coming before the court under Part II of the Child Welfare Act, and would have the right to intervene or appear on the child's behalf in any of these matters or proceedings. The Law Guardian would receive notification of all cases under Part II of the Child Welfare Act in which an unmarried mother [or putative father appears to be under the age of majority].

3. Legal Department

It is clear that a family court system... will be dealing with a large volume of business. This will include the giving of opinions in certain cases. For example, in connection with applications for marriage licences, opinions are at present given by the Provincial Secretary's Department, and it has been recommended that this function should be transferred to the Legal Department of the family court system: (see Volume V, pp. 108-110).

It may also be necessary for the public interest to be represented in a case before the family court. If this is required, counsel for the public interest would normally be a member of the Legal Department of the family court system. Inter alia, the Legal Department should absorb the present functions of the Queen's Proctor.

In delinquency proceedings, it will be necessary for someone to represent the State to present evidence as to an act of delinquency, and so on. The Family Law Project considers it undesirable that this function should be carried out by police officers, social workers, etc. It should be carried out by a member of the Legal Department of the family court system. Social workers, probation officers, police officers, representatives of welfare departments, and so on, should appear before the family court in the role of witnesses, including the making of reports and including the giving of opinions within their field of competence. Thus, for example, save in exceptional circumstances, one would expect that, in delinquency proceedings involving a young person, the case would be presented by a member of the Legal Department of the family court system, and the child would be defended by a member of the Department of the Law Guardian. If the parents also thought it necessary to be legally represented, they could employ their own lawyer, either privately or through legal aid. If the proceedings are under Part II of the Child Welfare Act and, say, there is an application for Crown Wardship, the proposal for Crown Wardship, together with the evidence and reports, would be presented to the court by a member of the Legal Department and the child would be represented by a member of the Department of the Law Guardian.

It has been laid down a great many times by the courts and in legislation, that the welfare of the child is the over-riding principle in proceedings involving a child. The existence of this principle produces a difference between a case in which a child's welfare or future is involved, as compared with ordinary civil litigation, such as a contract or tort case. In these latter types of cases, we have a contest between the parties

(for example, with reference to money damages, or a piece of property) and subject to the rules of procedure and evidence, the parties establish the terms of the contest, such as what the issues will be, what facts will be alleged, admitted or denied, and what evidence will be called. Where, however, the proceedings involve the paramount principle of the best interests of a child, the court must apply this principle, whatever issues or form of contest the adult parties may propose, and irrespective of any agreements between them as to the 'lines of battle', or the disposition of the child. This view of the court's functions, in a case where the welfare of a child is involved, is not novel and has a long history, for example, in the practice of the Court of Chancery in England. It is felt that the proposed Department of the Law Guardian will be able to play an important role in helping the family court system to give greater practical reality to this approach. It is for this reason that it has been proposed above that the Department of the Law Guardian should have notice of all cases in the family court involving children, and a right of audience. It would seem desirable to provide also that the Legal Department should have notice of all cases in the family court involving children and should have a right of audience where the Department may think it appropriate to appear in the public interest, or for the assistance of the court in the presentation of reports and evidence, or where the judge may wish the Legal Department to appear. The Legal Department would not, of course, appear on behalf of the child, since this is the function of the Department of the Law Guardian.

The Legal Department should also have functions with relation to maintenance proceedings and enforcement of maintenance orders between husband and wife or parent and child. To assist the Legal Department in this work, it should have an Assessment Branch attached to it.

The Family Law Project is considering proposals for a revision of the law with reference to the assessment of enforcement of maintenance orders. A detailed analysis of this area and recommendations will be submitted to the Commission in a later volume of the study prepared by the Project. Consequently, this particular function of the Legal Department and its Assessment Branch is only mentioned briefly here, in order to complete the picture of the proposed organization of the family court system. Proposals as to the role and functions of the Assessment Branch will be submitted in a later volume. ...

The Legal Department and the Assessment Branch should have their base at the headquarters of the family law system in Toronto, and should have branches at court centres throughout the Province.

4. Records and Data Processing

Since the family court system is (1) a Provincial system, and (2) possesses a number of ancillary and other departments, it will be a rather complex operation administratively.

- (a) The need to have complete and up-to-date records which will include court records, pre-court and dispositional records and reports; accounting and other records connected with maintenance orders.
- (b) The need to programme appointments with case workers, doctors etc., as well as the court calendar itself, in the most effective way. Arrangements for witnesses will also have to be considered, as well as attendances of parents, adjournments of cases and so on.
- (c) The court should be able to correlate case data supplied by different departments and from outside the court system; and

- (d) Judges should be provided with complete and immediate information on the position of institutions, foster homes and other dispositional facilities.

Since what is being discussed here is a somewhat new type of court system, and since anything that is recommended in this connection ought to be of superior quality, the system ought to have up-to-date administrative methods to make its work as effective, quick and complete as possible, and as considerate as possible of the legitimate interests of the public.

With these considerations in view, it is recommended that consideration be given to:

- (a) the use of the most up-to-date administrative methods in order to make the work of the court as effective, quick and complete as possible, and a consideration of the use of computer assisted data processing in this connection; and
- (b) the possibility of holding sittings of the court during evening hours or on Saturdays, and of keeping open appropriate offices of the court at similar times.

5. Administration and Accounts Department

In addition to the above described departments of the family court system, there will obviously be a need for an administrative and accounts department. This, however, does not seem to require any special comment in this study.

Prevention of Delinquency and Dispositional Facilities

Since the Family Law Project is concerned with the general area of Provincial family law, it follows that the general question of delinquency, being Federal, is not within the scope of the Project, although many related matters are, and it is hard to draw the line between the areas of Federal and Provincial concern.

The community should be concerned not merely with having good methods of dealing with cases of delinquency once they have occurred, but also in a positive way, with attempts to reduce juvenile delinquency by preventive measures. In this regard, the prevention of delinquency and the provision of well-planned and enlightened dispositional facilities, whether of an institutional character or otherwise, are perhaps closer together than might appear at first glance. Both are related with the operation of the family court system and with the objectives of that system. ... There can be few more promising points of attack for a serious attempt to reduce and control crime in the community than to try to develop a first-class family court system, coupled with energetic measures in the related areas of prevention of delinquency, and the provision of dispositional facilities.

In regard to prevention, a small but interesting beginning has been made in Toronto and Ottawa, where a Youth Bureau has been established by the Police Departments. ... The Family Law Project recommends that the Government should consider, as a matter of urgency, the work of Youth Bureaux in Ontario.

It is recommended also that consideration be given at an early date to substantial development of this police function, not only in city police forces, but also by the Ontario Provincial Police.

It is further recommended that an early study be made, with a view to action, on the training of police officers in youth work in co-operation with family courts.

Another not-unrelated area which requires study with a view to action, is the organization and development of dispositional powers

and facilities throughout the Province. Both are matters for which the Government should provide machinery for continued study, and in regard to which there should be close co-operation between the Government departments concerned and the Family Court system. Such study should make proposals for a uniform high standard and variety of dispositional facilities for children, particularly delinquent children, both institutional and otherwise.

The Family Law Project recommends that consideration should be given to the setting up of a Branch or Bureau in an appropriate Government department, intended to deal specifically with (a) the prevention of delinquency, and (b) the availability and development of dispositional facilities for children, both delinquent children and children under Part II of the Child Welfare Act. Included in the functions of such a Branch or Bureau would be:

- (a) research with a view to placing Ontario in the ranks of the most advanced jurisdictions in the world; (i) in methods of dealing with delinquency prevention, and (ii) in the range and quality of dispositional facilities and powers in relation to children; and
- (b) Maintenance of close liaison between the family court system as proposed in this study, Government departments (and in particular the Child Welfare Branch), children's aid societies, and local authorities and communities. Co-ordination of work in this field of delinquency prevention throughout the Province." (345)

The recommendations of the Ontario Family Law Project, supra, may be evaluated in light of the following criticisms of existing facilities and

procedures in the Juvenile and Family Courts of Ontario and the analysis of current needs formulated by Chief Judge H.T.G. Andrews:

"The Children's Aid Societies and Probation Services are hard pressed to fulfill a minimum of their primary statutory obligations. There exists no statutory obligation on any branch or agency, public or private, to provide intake and family counselling. In times of economic restriction it has been the first service to be reduced.

The public suffers in consequence. There is a tendency to general disillusionment when an arbitrary system of priorities ignores the needs of the fundamental social unit, permits the disintegration of its image, fails to protect the security of the family. What does the family do when its equilibrium has been destroyed and there is nowhere to turn for help? Granting welfare monies does help but money is but a part and by no means the largest part of total family needs.

'If family and juvenile courts in Ontario are to improve significantly...the emphasis should be on improving (i) dispositional facilities; and (ii) the ancillary services available to the court'.
(F.L.P.R.)

These ancilliary services are:

Intake Counselling: A counselling situation arises with every person coming to the court for help. He or she may come direct or may be referred by a welfare agency, a Children's Aid Society, the police, a lawyer, a legal aid administrator or etc. The problem must be ascertained, the possible courses of action explained, the possible (and probable) results of each course of action explored,

and the person left free to choose. It may be a referral for one or another type of service or it may result in legal action being commenced.

Intake counselling relates particularly to the unique social purpose of the court because it is at this original stage that family problems are given initial definition and preliminary goals are established. The service is now severely limited by lack of staff in the courts and by lack of training of existing staff. In consequence, the innumerable people simply turn away or arbitrarily proceed to court action without adequate guidance. The Intake Counselling Service deserves more substantial recognition by way of higher standards of qualification and training and increase in staff complement to do the job.

Family Counselling: Family counselling includes: marriage counselling, parent-child counselling and child counselling in the total family setting. It may include counselling or referral for financial problems, employment problems, housing and health problems, mother-in-law problems - any problems that concern that family, threaten its cohesion, jeopardize its harmony.

All too frequently a woman is referred to the court by any of the persons previously mentioned. There is no legal cause of action for desertion - simply a desperately unhappy home situation occasioned by the husband's attitude towards her or the children: excessive drinking; suspicion of marital infidelity; gambling; excessive debts or a combination of any number of insidious, threatening circumstances. The need may arise to meet a family crisis or it may require ongoing counselling support. In either case, the cry for help is heard and yet the court in most cases is unable to respond even with a referral to an appropriate agency.

Family counselling has suffered the greatest withdrawal of service since the provincial take-over of the family court system. It is very simply recommended that family counselling be developed as part of the social work team of the court. It is only with a full and co-ordinated legal and social response to family breakdown that the modern family rescue team can be effective.

Probation Services: A vitally important social work counselling service, it is a separate branch of the Department of Justice. The probation officers are administered and supervised by this branch and yet are officers of the court and subject to its direction. This duality of authority inevitably leads to conflicts which are compounded by lack of communication and lack of co-ordination in policy making. The service lacks staff. Re-organization is desirable together with the development of a specialized juvenile probation service and the union thereof with the court within a single supervising organization.

Detention and Observation Homes: Detention is the term applied to that custodial care given to a child between the time of his apprehension and subsequent hearing and disposition of his case. It is generally restricted for those children who would constitute a threat to the person or property of others, or a danger to themselves, or whose own home environment is so bad that it would be tragic to return the child to it. A child must be dealt with ".....not as an offender but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision". (Juvenile Delinquents Act of Canada).

The Province, following the Provincial Courts Act, assumed from the municipal corporations a variety of detention home situations ranging from excellent to questionable. No general inspection thereof has been made. There are no fixed standards, no policies established. The resource is non-existent

in the majority of regions within the Province and is woefully inadequate in all but three of the remainder.

Foster Group Homes: These are essential for the placement of children who are clearly not candidates for Training School, yet who cannot be returned to an appalling home situation. The Department of Justice has arrangements with a few families in various parts of the Province under which a retainer and per diem rate is paid for children whom the Court has placed in group homes. There is no governmental supervision, inspection or standards and no contractual uniformity in these arrangements. Children's Aid Societies in some Counties cooperate in the placement of children and of course do have established policies and standards. There is an universal shortage of this resource.

Training Schools: Although pressed for accommodation, Ontario's Training School system, its philosophy and administration, appears to compare favourably among the best in the world.

After-Care: After-care Officers, connected with the Training Schools administration, supervise children upon their release from the school. These officers operate in the same communities as probation officers thereby, to some extent, duplicating office and travelling expenses. Probation services are usually involved with a child through a probation order and social history report before he is sent to a training school. Following committal this relationship is terminated and the file closed. A new file and a new relationship must be established by the After-Care Officer upon release and rehabilitation of the child. This commonly means the return of the child to his home in the area of his original supervision by a probation officer. A grouping of after-care and juvenile probation services would be economic, efficient and would encourage the development of specialization in the services to children and young persons.

Psychiatric Services: The Family Court Judge is trained to seek out the causative factors behind the behaviour of a child. By ascertaining these factors he is better able to determine the child's needs and make an appropriate disposition of the case. During the course of proceedings, it may become apparent to the Judge that a psychiatric examination would be helpful. He may order it accordingly. If so indicated by the report, he may in his disposition, order the child to attend for treatment. There is a shortage of psychiatric services for both diagnosis and treatment.

Welfare Benefits: None of the Courts are presently involved directly with the administration of public welfare monies. It is included here because it is an essential service to the family. The administration of welfare is fragmented among scores of municipalities and the Provincial Government.

Uniformity of interpretation and administration is lacking with occasional seriocomic results. The present system lacks coordination with the Court, essential for maximum social impact and due financial recovery from defaulting husbands.

There is lack of uniformity and duplication in the method of enforcing maintenance payments. The husband is ordered to pay maintenance for his wife and children to the Family Court which maintains records. Municipal Welfare also maintains records of benefits paid to the wife. Some municipalities take an assignment from the wife of monies remitted to Court by the husband. The municipality receives such monies from the Court and maintains a record thereof as well. Subsequently the case is transferred to Family Benefits under Social and Family Services, which invariably takes an assignment, and a further set of accounts is maintained. There is no system devised for supervision of accounts and enforcement against delinquent defendants. In 1969, over eight million dollars were collected under maintenance orders. It is estimated that this probably represents about one-third of monies actually ordered to be paid. There is little doubt that the

Government loses millions of dollars annually in the failure of husbands to reimburse for welfare monies expended.

There is an obvious need to simplify and systematize present procedures.

ADMINISTRATIVE RESPONSIBILITY

Difficulties experienced in matters of policy and administrative co-ordination become understandable upon an examination of the sources of responsibility.

Intake Counselling: Department of Justice (through the Family Courts).

Family Counselling: Department of Justice (through the Family Courts and probation services); other profit and non-profit agencies.

Probation Services: Department of Justice (a separate branch).

Detention and Observation Homes: Department of Justice (through the Family Courts).

Foster Group Homes: Department of Justice (through the Family Courts); Children's Aid Societies via Department of Social and Family Services.

Training Schools: Department of Correctional Service.

After-Care: Department of Correctional Services.

Psychiatric Services: Department of Health.

Welfare Benefits: Department of Social and Family Services. Indirectly through municipal welfare and directly through Family Benefits.

Vital to the social objective, imperative to the expanding dimensions of public need is the integration of social and economic planning. This necessitates legislative changes for the logical grouping of judicial authority and administrative changes for the logical grouping of fragmented services.

The Family Law Project Report states:
(Vol. 10 p. 237 et seq.)

'The system should be so organized as to facilitate a high standard of judicial process, services and dispositional facilities...uniform... throughout Ontario'.

'If Family and Juvenile Courts in Ontario are to improve significantly in the next ten years or so, the emphasis should be on improving (i) dispositional facilities; and (ii) the ancillary services available to the Court'. (p. 240)

'It is desirable that there should be a well integrated structure, teamwork ...' (p. 241)

'There is need here for careful thought and planning and for the development of services on a Provincial basis'. (p.248)

'All ancillary services should be departments of the Family Court system...' (p. 249)

Under the present non-system, when a wife and children have been deserted by the husband, left in destitute circumstances, she applies for welfare benefits from the local municipality. The common response is that she must first lay a charge against her husband. She then attends the Court to lay the charge. Following, she returns to welfare for money. Throughout this process it should be noted as a general rule - no one communicates with the husband; the prospect of reconciliation is not explored; nor are the questions of consent payments, of custody, of access examined. On the contrary, once a charge is laid positions harden and the possibility of settlement of some or all of the issues is reduced.

A further deficiency generally exists. At a time of profound emotional trauma in the home, the wife and children receive only money. They are not given that help and support so necessary to smooth their adjustment to the changed situation; to make mandatory decisions required by the new family economics; to accept the reduction in living standards which usually follows.

Apart entirely from cases which lead to court action are the multitude of family counselling situations which arise annually. One of the first needs of a husband or wife in an unhappy home is to 'talk it out' with someone who can likely help. These people generally turn to the Family Courts as the one resource in the community reputed to deal with family rights, responsibilities, etc. As noted previously the response is generally inadequate.

This same wife should need attend only one person, an intake officer. Here the process may take one or more of several directions. He may requisition welfare monies; initiate tracing of the husband; enter into an enforceable voluntary agreement with the husband; refer for family counselling; commence Court action; procure Legal Aid; refer to medical, housing or employment agencies, etc. Throughout all there must be provided the essential human response of personal interest, counselling support and the continuing exploration of more satisfying, useful alternatives in an unhappy circumstance.

RECOMMENDATIONS FOR IMPROVEMENT OF RESOURCES

1. That Intake Counselling be recognized as an essential service of each Family Court and that personnel be employed and trained accordingly;
2. That Family Counselling be recognized as an essential service to the people of Ontario and that this service be provided by trained personnel either employed by the Court or purchased by the Court from outside agencies;

3. That a distinct Youth Counselling Service be developed, to include juvenile probation and after-care, integrated with the Family Courts social response team;
4. That a network of Detention and Observation Homes and Foster (Group) Homes (including use for short-term "open" detention) be developed and interlocked with the Family Court Youth Counselling Service;
5. That the Training Schools continue their programme of development and be co-ordinated with the Youth Counselling Service;
6. That a means be developed to provide adequate psychiatric services to meet the needs of the co-ordination thereof with the other Court resources;
7. That a study be made of the present system by which Provincial and Municipal welfare assistance is processed and reimbursed with the objectives of (a) determining the appropriate role of the Family Court; and (b) simplifying and improving procedures.

RECOMMENDATIONS FOR GROUPING OF RESOURCES

There are two logical alternatives by which resources and administrative functions may be grouped to provide for the development of an integrated programme and activity, with built-in flexibility to permit of ready response to changing short and long term goals.

Alternative One: A 'Family Court Services Division' of the Department of Justice, responsible for over-all administration of the Provincial Court (Family Division); training and scheduling of Judges, of staff; determining staff complement, accommodation needs; resource needs. Within this Division would be incorporated the following Branches:

1. The Counselling Services Branch:

including; Intake Counselling
Family Counselling
Administration of Welfare Benefits
Probation Services (Juvenile)
After-Care
Co-ordination with psychiatric services

In urban centres one or more persons may specialize in each separate phase of counselling. In remote areas all services may be provided by one or two social workers.

2. The Youth Homes Branch:

including: Detention and Observation Home Care
Training Schools
Foster (Group) Homes

Alternative Two: A 'Family Services Division' of the Department of Social and Family Services. In this alternative, administration would be divided between the adjudicatory and the social roles of the Court. The Department of Justice would retain the administration of the Provincial Court (Family Division), the training and scheduling of Judges, the provision of Court accommodation and the small staff necessary to run the Courts. The Department of Social and Family Services would supervise and administer the two branches recommended.

Alternative One is preferable. The ideal social and economic objectives will not be as closely approached if services are divided between two Government Departments. This is recognized in the Family Law Project Report which states: 'All ancillary services should be departments of the Family Court system'. Experience in Ontario and even more so in other countries indicates that the success of social programmes involving the possibility of ultimate judicial determination depends upon how closely these programmes fall under the aegis - the control, the prestige, the psychological discipline - of the judicial authority.

Two examples will demonstrate the logic of maximum integration:

There should be a total treatment approach for troubled children. A union of probation counselling, training school care and rehabilitation supervision (after-care) would allow a consistent, continuing plan for each child. The Judge is deeply involved therein. He must determine needs (using such other professional help as necessary) and design and institute the programme. His involvement is initiated

upon the first hearing and normally repeated upon several subsequent Court appearances. It is upon the sanction of the Judge that the whole process of training and treatment of the child commences. The social purpose of the Court does not permit the Judge to wash his hands in vinegar. He continues to be involved and can only work to maximum effect if there is a close partnership between himself and his resources.

The Court must have control over intake services. This is necessary because the role and jurisdiction of the Court can best be explained by a person employed, trained and supervised by the Court. Only in this way, too, can the Court control its schedules and daily case-load. The intake counsellors normally interview the same persons as do welfare administrators, maintain files and accounts on the very same persons as those upon whom public welfare authorities maintain files and accounts. A union of the two services would appear practicable and economic. To sustain the necessary controls the counsellors would have to be within the Family Court system. It should be added that Family Counselling is a logical extension of Intake Counselling. In larger Courts a referral could be immediate and direct if the Family Counsellors serve within the Court structure. In a small Court the same person would assume two counselling functions.

FINANCIAL CONSIDERATIONS

On the one hand, the integration of certain of the services will avoid duplication and thereby save tax dollars. On the other hand, the expansion of essential services will cost a great deal of money. It is my submission that the objectives are worth the cost. (346)

The recommendations of the Institute of Law Research and Reform, Province of Alberta, and of the Ontario Family Law Project, supra, are substantially echoed in recommendations formulated by the Civil Code Revision Office

in its Working Paper on The Establishment of a Family Court in Quebec, wherein it is stated:

"D. Complementary Specialized Services:

The effectiveness of the Family and Child Court depends on close cooperation between judges, referees, advocates and the complementary specialized services. These services are not merely useful but necessary to achieve the court's objectives of conciliation, assistance and rehabilitation.

The Social Welfare Court presently employs specialists in human behavioural sciences, in particular social workers, psychologists and criminologists, their main role being to provide the judge with insights allowing him to make decisions better adapted to litigants' needs while taking account of the various aspects of the problems submitted to him.

However, the courts with jurisdiction in family matters properly so called in Quebec do not have a full complement of specialized services at their disposal, and thus have rather limited means of action.

By its very nature a family conflict is primarily a human problem involving personal relations between husband and wife, which incidentally takes on the aspects of a legal problem. For this reason, the court cannot found its decisions entirely within the strictly juridical field.

The Committee therefore makes the following recommendations:

RECOMMENDATION #37:

THE COMMITTEE RECOMMENDS THAT THE FAMILY AND CHILD COURT BE PROVIDED WITH THE SERVICES REQUIRED FOR ITS PROPER OPERATION. THE COMPLEMENTARY SPECIALIZED SERVICES WOULD INCLUDE:

- (a) THE INTAKE SERVICE
- (b) THE INVESTIGATING SERVICE
- (c) THE CONCILIATION SERVICE
- (d) THE CLINICAL SERVICE
- (e) THE YOUTH AND PROBATION SERVICES
- (f) THE COLLECTION SERVICE

RECOMMENDATION #38:

THE COMMITTEE RECOMMENDS THAT AN INTAKE SERVICE BE ESTABLISHED TO RECEIVE LITIGANTS, ADVISE THEM OF THEIR RIGHTS, REFER THEM TO THE APPROPRIATE SOCIAL OR HEALTH SERVICES IF NECESSARY, AND, IN CHILD MATTERS, INDICATE THOSE CASES THAT REQUIRE COURT INTERVENTION AND PLAY THE ROLE OF CONCILIATOR FOR A SHORT PERIOD.

RECOMMENDATION #39:

THE COMMITTEE RECOMMENDS THAT THE INTAKE SERVICE HAVE NO RIGHT TO IMPOSE MEASURES WITHOUT THE CONSENT OF THE PARTIES CONCERNED AND THAT IT BE BOUND TO ADVISE THEM OF THEIR RIGHT TO ADDRESS THE COURT DIRECTLY.

RECOMMENDATION #40:

THE COMMITTEE RECOMMENDS THAT THE STATEMENTS OR ADMISSIONS MADE BY THE PARTIES WHEN INTERVIEWED BY THE INTAKE SERVICE AND THE INFORMATION THEN PRESENTED BE CONFIDENTIAL AND INADMISSIBLE AS EVIDENCE IN ANY TRIAL WITHOUT THE CONSENT OF THE PARTIES CONCERNED, AND THAT THE INTAKE SERVICE BE BOUND TO SO ADVISE ITS CLIENTS.

RECOMMENDATION #41:

THE COMMITTEE RECOMMENDS THAT THE COURT BE PROVIDED WITH AN INVESTIGATION SERVICE TO INQUIRE, AT THE REQUEST OF THE JUDGE OR THE PARTIES, INTO THE SOCIAL ASPECTS OF THE CASES SUBMITTED TO IT AND TO MAKE A WRITTEN REPORT TO THE COMPETENT AUTHORITY.

RECOMMENDATION #42:

THE COMMITTEE RECOMMENDS THAT A CONCILIATION SERVICE BE INSTITUTED AT THE FAMILY DIVISION OF THE FAMILY AND CHILD COURT TO ASSESS THE GRAVITY OF THE CASE, TO MAKE THE SPOUSES AWARE OF ALL THE ASPECTS OF THEIR PROBLEMS AND TO HELP THEM FIND APPROPRIATE SOLUTIONS.

RECOMMENDATION #43:

THE COMMITTEE RECOMMENDS THAT A CLINICAL SERVICE BE ATTACHED TO THE FAMILY AND CHILD COURT, CONSISTING OF PHYSICIANS, PSYCHOLOGISTS, PSYCHIATRISTS AND SOCIAL WORKERS. THIS SERVICE WOULD MAKE THE CLINICAL EXAMINATIONS AND ACT AS CONSULTANT TO THE INTAKE SERVICE, THE COURT, THE MEMBERS OF THE YOUTH SERVICE AND THE PROBATION OFFICERS.

RECOMMENDATION #44:

THE COMMITTEE RECOMMENDS THAT IN JUDICIAL DISTRICTS WHERE NO CLINICAL SERVICE IS ATTACHED TO THE COURT, THE EXISTING COMMUNITY RESOURCES PROVIDE THE FAMILY AND CHILD COURT WITH THE SPECIALIZED PROFESSIONAL ASSISTANCE IT NEEDS.

RECOMMENDATION #45:

THE COMMITTEE RECOMMENDS THAT A YOUTH SERVICE BE INSTITUTED AT THE CHILD DIVISION OF THE FAMILY AND CHILD COURT TO SEE THAT THE DECISIONS RENDERED BY THE COURT ARE CARRIED OUT IN THE CASES ENTRUSTED TO IT, TO OFFER AID AND COUNSEL TO THE CHILD, TO FOLLOW HIS DEVELOPMENT AND THAT OF HIS FAMILY ENVIRONMENT, AND TO MAKE PERIODIC WRITTEN REPORTS TO THE COMPETENT AUTHORITY.

RECOMMENDATION #46:

THE COMMITTEE RECOMMENDS THAT A PROBATION SERVICE BE INSTITUTED AT THE CHILD DIVISION OF THE FAMILY AND CHILD COURT TO ENSURE THE SUPERVISION OF JUVENILE OFFENDERS ON WHOM THE COURT HAS IMPOSED PROBATIONARY MEASURES AND TO FOSTER THE REINTEGRATION OF THESE CHILDREN INTO SOCIETY.

RECOMMENDATION #47:

THE COMMITTEE RECOMMENDS THAT A COLLECTION SERVICE BE ESTABLISHED TO COLLECT, WHERE THE PERSON OWING MAINTENANCE IS IN DEFAULT, THE SUMS DUE UNDER A MAINTENANCE ORDER AND TO REMIT THEM TO THE PERSON TO WHOM THE MAINTENANCE IS OWED.

RECOMMENDATION #48:

THE COMMITTEE RECOMMENDS THAT THE GOVERNMENT BE SUBROGATED IN THE RIGHTS OF THE PERSON TO WHOM MAINTENANCE IS OWED.

RECOMMENDATION #49:

THE COMMITTEE RECOMMENDS THAT WHERE THE PERSON OWING MAINTENANCE IS IN DEFAULT TO PAY, THE PERSON TO WHOM MAINTENANCE IS OWED BE PAID THE ALLOWANCE HE WOULD BE ENTITLED TO ACCORDING TO THE STANDARDS PROVIDED BY THE SOCIAL AID ACT, S.Q. 1969, c. 63.

RECOMMENDATION #50:

THE COMMITTEE RECOMMENDS THAT THE STAFF OF THE SPECIALIZED COMPLEMENTARY SERVICES OF THE FAMILY AND CHILD COURT BE HIGHLY QUALIFIED AND SUFFICIENTLY NUMEROUS TO MEET THE REQUIREMENTS OF THE COURT AND THE LITIGANTS." (347)

With respect to the availability of legal resources to and in the proposed Family Court, the Quebec Working Paper further stated:

"C. The Advocate:

The Committee, conscious of the necessity of ensuring the adequate functioning of Justice in family matters and the respect of the due process rule, deems it essential to allow advocates to be present before the Family and Child Court, whether it be as Attorneys, Crown Prosecutors, as the case may be, or as legal advisors in the Intake Service.

The Committee is also of the opinion that advocates associated with the work of the Family and Child Court should have sufficient knowledge of the objectives of the Court, of the rules of procedure to be applied therein, as well as of the various rehabilitation and assistance measures to be offered to the parties.

The Committee therefore makes the following recommendations:

RECOMMENDATION #31:

THE COMMITTEE RECOGNIZES THE RIGHT OF EVERY PERSON, ADULT OR CHILD, TO BE REPRESENTED BY AN ADVOCATE BEFORE THE FAMILY AND CHILD COURT.

RECOMMENDATION #32:

THE COMMITTEE RECOMMENDS THAT THE LITIGANT BE DULY ADVISED OF HIS RIGHT TO BE REPRESENTED BY AN ADVOCATE.

RECOMMENDATION #33:

THE COMMITTEE RECOMMENDS THAT THE LITIGANT BE ENTITLED TO RETAIN THE ADVOCATE OF HIS CHOICE OR, IF ADMISSIBLE, TO AVAIL HIMSELF OF THE SERVICES ESTABLISHED BY THE LEGAL AID ACT (Bill 10, assented to July 8, 1972)

RECOMMENDATION #34:

THE COMMITTEE RECOMMENDS THAT ANY CHILD INVOLVED IN PROCEEDINGS BEFORE THE FAMILY AND CHILD COURT BE ENTITLED TO LEGAL AID, IF HE SO WISHES OR IF THE JUDGE OF HIS OWN MOTION DESIGNATES A LEGAL ADVISER OR AN ADVOCATE FOR THE CHILD.

RECOMMENDATION #35:

THE COMMITTEE RECOMMENDS THAT ANY ADVOCATE ACTING AS ATTORNEY FOR THE LITIGANT BE INDEPENDENT OF THE COURT.

RECOMMENDATION #36:

THE COMMITTEE RECOMMENDS THAT ADVOCATES BE ATTACHED TO THE FAMILY AND CHILD COURT TO WORK AS CROWN PROSECUTORS OR AS LEGAL ADVISERS TO THE INTAKE SERVICE." (348)

Less comprehensive recommendations reflecting similar opinions to those adopted in Alberta, Ontario and Quebec are included in the Newfoundland Family Law Study, Final Report on Family Courts, wherein it is stated:

"The Court's necessary facilities

a) The family court should have an intake service. The function of such a service is to screen the people who are coming to the family court. The service is diagnostic. It decides, for example, whether a court hearing is necessary in a particular case or whether some form of counselling or other treatment is necessary, and it directs the person to the appropriate agency or person. An intake service would vastly increase the efficiency of the court by avoiding unnecessary litigation. This service would aid a family court to achieve its functions of helping families and protecting the community. The decisions made at the intake affect individual and community rights—the right of the community to be protected,

the rights of the child and family to personal freedom and privacy, and at the same time the right of the child and family to receive the services of the State for care, protection and treatment.

b) There is a great need for probation officers throughout the province. These officers are needed for both adult and juvenile probation.

c) There is a great need for adequate detention facilities - particularly for juveniles. This need is obvious in St. John's and even more so throughout the rest of the province.

d) The court needs the services of professionally trained people i.e. psychiatrists, social workers, counsellors.

It seems that the Newfoundland Law Society will not provide Legal Aid to family courts. One should keep in mind that the lawyers give Legal Aid in Newfoundland without remuneration.

If legal rights are to be fully protected, some thought should be given to obtaining the services of lawyers by either

- a. having a lawyer available to family court as a law guardian, or
- b. having society pay lawyers to represent litigants in family court through the use of public funds. ...

RECOMMENDATIONS

SPECIFIC - FACILITIES

1. Family courts must be equipped with an intake service. Parties should have a diagnostic appraisal before a court appearance.

2. Proper detention facilities should be provided for each family court.

3. Probation officers for adults and children must be available to each family court.

4. Psychiatrists, psychologists and social workers should be available to each court. There should be facilities for psychological testing and psychiatric treatment, an alcoholism clinic, marriage counselling, child therapy workers for children showing anti-social behaviour because of the conflict of their parents.

SPECIFIC - PROCEDURES

1. Every person appearing in family court should be entitled to legal counsel. Some thought should be given to the idea of making lawyers available to family court." (349)

A comparative analysis of the above research studies indicates that there is a substantial measure of agreement concerning the types of services or facilities that should be available to or in the Family court. Although serious and difficult questions arise on whether the respective support services or facilities should be isolated, insulated or integrated from or in the Family Court, a meeting of the Canadian provincial and federal law reform bodies, held in Edmonton on June 26-27, 1972, encountered no difficulty in achieving unanimous endorsement of the following proposals:

"There must be available to the Family Court and to persons appearing before it certain 'supporting services', the precise nature of which may vary but which may be described in general terms as follows:

(1) An 'intake' procedure to be available for consultation by a person seeking the assistance of the court and to discuss the possibility of reconciliation of the parties or conciliation with respect to specific issues;

(2) Some form of conciliation and reconciliation service;

(3) Investigative services to make available to the court in appropriate cases a source of facts relating to the family;

(4) Legal representation for the parties to the litigation and for children of the parties;

(5) Enforcement services to see to the collection of money payable under maintenance orders, with appropriate administrative facilities and legal mechanisms and procedures;

(6) Probation services;

(7) Services relating to adoptions.

These services must be sufficiently under the influence or direction of the court so than they will operate in the interests of the court and of the litigants. Certain of them, such as 'intake' and enforcement services, should be more closely related to the court than others such as investigative services. Where persons providing these services appear before the court, both the fact and the appearance of the independence of the court must be carefully preserved. Care must be taken to see that the confidentiality of information received in confidential proceedings is preserved." (350)

The Canadian proposals respecting auxiliary or support services in the Family Court are substantially reflected in studies undertaken in foreign jurisdictions. For example, the Commission on Children and Youth for the State of Hawaii has stated:

"The Commission on Children and Youth believes that marriage counseling services should be a part of the family court structure. The Commission is aware that available community resources

should be used as much as possible in marital counseling, but it feels that a court-administered service is important in order to provide immediate services when needed. In marriage counseling immediately prior to a contemplated divorce, timing and availability of service are of utmost importance if counseling is to be successful. Also, a court-administered counseling service could be used primarily to resolve the initial phase of the difficulty. Referrals then could be made to appropriate community resources for more intensive or longer term services. Specialized services would be offered by the proposed family court in other areas including determinations of support and alimony, child custody, etc.

An effective family court would need an adequate and competent staff to administer these specialized services. The make-up and the size of the staff would depend on the extent to which the specialized services are court based. The minimum composition of the court based staff is considered to be as follows:

- a. Chief judge of the family court
- b. Judges and/or referees
- c. Chief clerk and court clerks
- d. Documents receiving clerks
- e. Bailiffs
- f. Court reporters
- g. Intake counselors
- h. Probation counselors
- i. Marriage counselors
- j. Reception - clerical - stenographic workers
- k. Fiscal section
- l. Statistical section
- m. Detention services

Specialized services such as medical, psychological, and psychiatric are essential and may be court based or community based. Of primary importance is their immediate availability. Situations involving family crises tend to deteriorate rather than improve when evaluation and treatment are delayed." (351)

And, in England, the Institute of Judicial Administration at the University of Birmingham has stated:

"29. With great hesitation, we suggest that the personnel of the court should consist of both judicial and 'executive' (although we do not favour this word - perhaps 'court helpers' might be suitable).

A. The Judicial

(a) A Family Court Chairman, who should be a lawyer, with a special training in human behaviour or some background of participation in community welfare.

(b) Laymen and women, perhaps chosen as J.P.s presently are and arguably, trained in a similar way to that of counselors in the Marriage Guidance Council.

(c) Senior Social workers or possibly senior officers of the Department of Health and Social Security.

It is suggested that each panel should consist of a lawyer chairman, two lay assessors and a social worker. The bench should at each sitting be so constituted that it contains at least one woman and at least one man. The court should have power to co-opt specialist assessors.

B. The Executive

30. The executive officers should consist of clerical officers, together with:-

(a) Social workers;

(b) Marriage guidance counsellors;

(c) Personnel of a legal aid and advice bureau, who inter alia, should be guardians ad litem of children in all cases affecting them;

(d) Possibly, a 'general adviser', akin to the director of a Citizens' Advice Bureau.

31. We do not think that the court ought to be differently constituted for different purposes for the reason already stated, that the function of a family court will be to perceive a total view of a family situation, and to relate a particular dispute to this total situation." (352)

Tentative Conclusions

The writer tentatively concludes that the following services or facilities should be available to or in the Family Court:

1. Administrative services (including accounting, records and data processing);
2. Intake services;
3. Family counselling and conciliation services;
4. Clinical services (including psychiatric and psychological services);
5. Legal services (including law guardian);
6. Investigation services;
7. Youth and Probation Services (including after-care services, and detention and observation facilities);
8. Enforcement services.

The writer proposes to examine the respective auxiliary or support services in greater detail in due course and such examination will seek to formulate guidelines concerning the isolation, insulation or integration of the respective services from or in the Family Court. Certain general observations may nevertheless be appropriate at this point. The inter-relationship of court auxiliary services and community services and resources has been previously analyzed. (353) The writer strongly urges

that court services should seek to complement and not compete with existing services in the community⁽³⁵⁴⁾ and concludes that the needs of the Family Court for auxiliary services will vary substantially according to local circumstances. The writer is also of the opinion that the Family Court should not seek to become a "family clinic" with a judicial arm attached as the ultimate means of disposing of inter-spousal or familial conflicts. Consideration should be given to the feasibility of establishing "community clinics" independent of the Family Court to provide an inter-disciplinary therapeutic approach to the resolution of matrimonial and familial conflicts. To superimpose the character of a "family clinic" upon a unified Family Court would, in the writer's opinion, threaten the viability of such a court from the outset. It should not be inferred, however, that the writer concludes that therapeutic counselling services have no place in the Family Court. Short-contact counselling by the staff of the Family Court may be necessary and desirable in the search for an alternative to judicial disposition of conflicting claims.

DETAILED ANALYSIS OF AUXILIARY AND SUPPORT SERVICES

Administrative services (including accounting, records and data processing)

The writer endorses the opinions expressed in the Working Paper of the Institute of Law Research and Reform, Alberta,⁽³⁵⁵⁾ and in the Report of the Ontario Family Law Project⁽³⁵⁶⁾ respecting the need for adequate administrative facilities to discharge the various types of function therein described. The writer also endorses the conclusions expressed in the Alberta Working Paper that such services do not appear to raise

substantial controversy and that they should be under the direction of the Clerk of the Court.

Intake (357)

Before seeking to ascertain the prospective role of intake services in a unified Family Court, it seems desirable to define the term "intake". Judge H. A. Allard has offered the following description of the intake process:

"The use of the term 'Intake' in the Family Court has a very special meaning, and without specialized intake arrangements Family Courts can not generally be in existence. Intake personnel may be probation officers, social workers, family counsellors, or specially designated court clerical staff. The function of intake personnel is to interview persons coming to the court for the first time or for new problems and participate with that client in decisions about Juvenile and Family Court matters. Sometimes the contact at this point is very brief as the client may be referred to other appropriate agencies or for legal aid. In other circumstances a process of pre-trial counselling may be established or steps initiated in resolving some disputes on an out-of-court basis. In a well-structured Family Court the intake process is inseparable from the other helping processes of counselling and after-court follow up services. In some Family Courts considerable discretion is placed in the hands of the intake workers as to whether in fact court proceedings will be initiated. It is interesting to note that the intake process in child protection cases in most Canadian Juvenile and Family Courts does not take place in the court setting but in the appropriate children's aid society or provincial department of child welfare. The intake intervention is one of the main services which separates the Family Court from other courts regardless of whatever agency has the discretion to intervene and screen cases before they arrive at the court." (358)

The operation and significance of intake procedures in Juvenile Courts in the United States have been correspondingly described in the following terms:

"The intake process is an important one in specialized courts and is generally advocated on the grounds that it permits the court to screen its own intake not just on jurisdictional grounds, but, within some limits, upon social grounds as well. It can cull out cases which should not be dignified with further court process. It can save the court from subsequent time-consuming procedures to dismiss a case. It provides an immediate test of jurisdiction at the first presentation of a case. It ferrets out the contested matters in the beginning and gives the opportunity for laying down guidelines for appointment of counsel and stopping all social investigation and reporting until the contested issues of fact have been adjudicated. It provides machinery for referral of cases to other agencies when appropriate and beneficial to the child. It gives the court an early opportunity to discover the attitudes of the child, the parents, the police, and any other referral sources. It is a real help in controlling the court's case-load. Because it operates in the sensitive area of direct confrontation with the police, the school, and other community agencies, intake can make or break the community's good communication with and understanding of the juvenile court's role." (359)

Although the general character and function of intake services may be defined with some degree of precision, intake practices are far from uniform even in courts operating under the same legislation. The organization and size of the intake unit, the duties performed and the procedures followed vary from court to court. (360)

To facilitate the definition of the nature and function of intake services in a unified Family Court, the writer proposes to set out the specific proposals respecting intake that were endorsed in the Working Paper on Family Court prepared by the Institute of Law Research and Reform,

Alberta, and to examine these proposals seriatim. In Recommendation 14 of the Working Paper, the first proposal states:

"(1) That there should be an intake service attached to the family court and staffed by court counsellors."

The proposal is echoed in the conclusions expressed by Chief Judge Andrews⁽³⁶¹⁾ and also in the studies on Family Courts undertaken in Newfoundland⁽³⁶²⁾ and Quebec.⁽³⁶³⁾ The writer endorses the proposal having regard to the underlying objectives of the intake procedure. A primary objective is to promote the resolution of matrimonial and familial conflicts without recourse to judicial disposition. If intake is effective, it facilitates the strategic use of personnel available in the court or in the community at large and results in a more constructive resolution of matrimonial or familial discord and substantial financial savings. The writer concurs in the following conclusions expressed in the Report of the New Jersey Family Court Study Commission:

"7. A FAMILY COURT CANNOT FUNCTION PROPERLY UNLESS IT EMPLOYS SUFFICIENT NUMBERS OF BOTH JUDICIAL AND PROPERLY TRAINED NON-JUDICIAL PERSONNEL.

The latter, particularly, must also be experienced in the various social and psychological disciplines which arise in the context of family matters that come to the attention of the court system or ought to.

Though the prospective costs of such a system are not insubstantial, they are certainly warranted by the need. Another factor exists which, though incalculable with precision, might result in significant mitigation of cost. Proper intake and counseling services will result in the resolution of many matters in their early stages, thereby obviating the need for formal judicial proceedings. Thus, a reduction in numbers of court cases should occur with all concomitant cost savings.

8. PROPER INTAKE AND COUNSELING SERVICES MUST BE PROVIDED SO THAT MATTERS MAY COME TO THE ATTENTION OF AND BE DEALT WITH BY THE FAMILY COURT SYSTEM BEFORE THEY ARE FORMALIZED INTO LEGAL PROCEEDINGS.

Often a situation can be dealt with remedially in an informal context where the commencement of formal legal proceedings would tend to so crystallize attitudes as to render the matter irreparable. The provision of proper intake and counseling services would necessarily involve three changes:

- a. The employment of properly trained personnel to perform intake services, to deal intelligently and circumspectly with the parties, and to make informed judgements respecting the kinds of counseling services which would assist in achieving a remedy.
- b. Either the employment of trained persons in fields such as social work and psychology to perform such counseling services or the establishment of formal lines of communication and functional cooperation with existing social service agencies in the public and private sectors, or a combination of both approaches.
- c. Public education in order to achieve a realization that the Family Court exists to serve even in the early stages of difficulty, that no stigma should be attached to the use of such services, and that people will be dealt with as human beings and not as statistics.

There is ample evidence in other jurisdictions, notably the State of Delaware and Toledo, Ohio, that the best kinds of preventative and remedial results can be achieved through a properly organized and functioning family court to the benefit of society as a whole." (364)

The second proposal of the Institute of Law Research and Reform, Alberta, reads as follows:

"(2) That the intake service should be available to persons coming to the family court but should not be compulsory and should not exercise a discretion to prevent a person from commencing proceedings."

Opinions may vary on the question whether recourse to the intake service should be voluntary or mandatory. Insofar as the intake service is designed to circumvent the adversary process and promote a conciliatory process, it could be contended that a mandatory and universal intake procedure should be established. Having regard to the dearth of qualified personnel and the financial cost of implementing a mandatory and universal intake procedure, the writer endorses the proposal in the Alberta Working Paper that recourse to intake services should be voluntary.⁽³⁶⁵⁾ It is doubtful whether this opinion would change regardless of the availability of personnel and financial resources since mandatory and universal schemes inevitably run the risk of failure by reason of the resistance of affected parties and the danger of pro forma dispositions.⁽³⁶⁶⁾

The conclusion expressed in the Alberta proposal that the intake service must not prevent the institution of proceedings and recourse to the court by an interested party is echoed in Recommendation 39 of the Quebec Working Paper.⁽³⁶⁷⁾ A similar conclusion was expressed in the Proceedings of the Section of Family Law (American Bar Association), 1965, wherein the following statements appeared:

"It is to the advantage of many people involved in family court proceedings that efforts be made to explore the possibilities of non-judicial resolution of their problems. To provide this service, personnel have been hired on the staff of, or responsible to, the court. These services have been largely in the hands of social work personnel and not in the hands of lawyers, prosecutors, or

others trained in the legal process. The chief service which this personnel performs is to suggest when appropriate treatment or adjustment might be more effective than resorting to the judicial process. However, intake workers should never prevent or inhibit the intervention of the judicial process in any case or situation. It must be remembered that no one can foreclose the rights of any individual to pursue his legal remedies if he desires to do so and that there must be compliance with the provisions of law and full protection of the legal rights of all parties." (368.)

The third proposal of the Institute of Law Research and Reform, Alberta, reads as follows:

" (3) That the functions of the intake service should be preliminary counselling, referrals to outside agencies where there appears to be a possibility of reconciliation or where such referrals may help in settling specific issues, canvassing the possibilities of settlement of specific issues, and (where there are summary procedures and such assistance seems necessary) the preparation of affidavits to commence maintenance and custody proceedings."

This proposal appears to focus primarily on the function of the intake service in cases of inter-spousal conflicts, including conflicts involving the custody and maintenance of children. It appears desirable to extend its ambit so as to expressly define the function of the intake service in cases of child neglect or juvenile delinquency. These matters are incidentally included in Recommendation 38 of the Quebec Working Paper.⁽³⁶⁹⁾ Detailed proposals and legislative guidelines respecting the role of the intake service in cases of child neglect and juvenile delinquency have been formulated in the United States and could constitute a model for adoption in Canada.⁽³⁷⁰⁾ In the final analysis, the success of intake

procedures will be dependent upon the availability of well qualified personnel⁽³⁷¹⁾ and the application of valid objective criteria. Thus, John A. Wallace and Marion M. Brennan have observed:

"The provision of the Family Court Act of the State of New York, and the Rules of Court thereof, that the preliminary procedure shall be executed by the probation service, presents probation services everywhere in this State with an enormous challenge to provide the kind of staff that can meet this grave responsibility. The individuals chosen for this type of assignment must have not only superior knowledge and skill in interviewing, knowledge of the law and familiarity with community resources, but they must have as well the ability to gain a client's confidence quickly and the capacity to make sound decisions on the basis of short contacts and limited information.

Decision making at intake is very important and cannot be over-emphasized. Two basic decisions must be made at the point of intake. The first is a relatively simple one—the intake worker must decide whether the matter appears to be within the jurisdiction of the court. To give an example, if the situation involves a delinquency and the child was 16 years of age when the act was committed, there is clearly no jurisdiction in the matter. The potential petitioner can be so advised and can be given information regarding alternate courses of action.

If there is jurisdiction, the next decision is crucial—is the authority and intervention of the court itself necessary? When the answer is in the affirmative, the probation officer at intake is obligated to have a petition filed as expeditiously as possible. The referral should be accompanied by all available material which may assist the court in making a disposition after the judge makes his finding of fact.

When referral for petition is not indicated, the intake officer has three

alternatives:

- a. that there be no further proceedings;
- b. that the matter be referred to a public or voluntary agency;
- c. That an attempt should be made on a short term voluntary basis to make an adjustment without the filing of a petition.

The success of probation in implementing intake will depend not only upon the assignment of skilled staff but also upon the training in case selection which is given to the staff involved. Lacking necessary objective criteria, individual staff members may develop their own subjective criteria. When this occurs, the basic criterion may be the nature of the act alleged and its significance to that officer. The story is told of a probation officer in another state whose car had been stolen and who subsequently referred all cases involving automobile theft for petition and judicial action.

Some criteria are basic to all matters handled at intake whether in neglect, delinquency, persons in need of supervision, support, or family offense. The following are situations which should be referred for the filing of a petition and judicial determination:

1. cases in which there is dispute about the allegations of the petition;
2. cases in which either party clearly indicated a desire to appear before the court;
3. cases in which one or more of the parties involved refuse normal cooperation;
4. cases in which the welfare and protection of the community is involved.

The following additional criteria requiring filing of a petition in cases of neglect, delinquency, and persons in need of supervision are suggested:

1. cases in which the child has been temporarily removed from his home and not returned thereto or in which the child has been detained prior to the appearance at intake;

2. cases in which a recommendation for temporary removal or detention is indicated;
3. cases in which there is reason to believe that placement or commitment will be necessary;
4. cases in which two or more children are involved in the same delinquent act and in which it has already been decided that one of the respondents must be referred to court on petition.

In cases involving support or family offenses, the following criteria are suggested as additional guides in determining which matters should be handled judicially:

1. cases involving emergency;
2. cases in which it appears that the safety of the petitioner or other person is in danger;
3. cases in which there is reason to believe that the respondent is about to leave the jurisdiction.

Two criteria for selecting cases which should be handled without the filing of a petition are common to all matters handled at intake. These criteria are:

1. cases in which the problem presented indicates a need for a relatively short period of service;
2. cases in which the matter has not had a serious impact on the community or does not present an emergency situation." (372)

The fourth proposal of the Institute of Law Research and Reform, Alberta, reads as follows:

"(4) That information received by the intake counsellor from a party or in confidence should be absolutely privileged from production in court, directly or indirectly, but that the intake counsellor's file along with other files in the possession of the court should be available to counsellors of the investigative service as a basis for their investigation. (This recommendation is subject to two strong dissents by members of our board who would make the intake counsellor's file privileged for all purposes and unavailable to anyone other than the intake counsellor for any purpose.)"

The reasons underlying this proposal, which seeks to reconcile full disclosure at intake with due protection of individual rights in the event of subsequent judicial proceedings and correlative investigations, have been set out previously.⁽³⁷³⁾ It may be useful to compare the Alberta proposal with Recommendation 40 of the Quebec Working Paper,⁽³⁷⁴⁾ whereby statements or admissions made on intake are confidential and inadmissible in any judicial proceeding without the consent of the parties concerned. This writer prefers and endorses the recommendation set out in the Quebec Working Paper and would preclude access by the investigative service to intake files and also to the files of court counsellors who have attempted to reconcile the parties or conciliate their differences.

The fifth proposal of the Institute of Law Research and Reform, Alberta, reads as follows:

"(5) That the intake service should be closely related to the court structure but that its premises should be somewhat separated from the premises of the court itself as for example by being upon a different floor of the same building. (This recommendation is subject to one strong dissent by a member of our board who would require a complete geographical and organizational segregation of the intake service.)"

The writer endorses this proposal and submits no further comment.

Family counselling and conciliation services

In determining the extent to which family counselling and conciliation services should be available in or to the Family Court, consideration should be given to the following questions:

1. What types of counselling and conciliation services are envisaged? Should counselling be directed at promoting reconciliation and preventing divorce, or should it be directed at conciliation of collateral matters, such as inter-spousal maintenance, property settlements, child support, custody and access, and other issues incidental to divorce where reconciliation is impossible or should it be directed at both?
2. Should counselling and conciliation services be established within the Family Court, be available on referral by the court, or be completely disassociated from the court?
3. Should counselling or conciliation be voluntary or mandatory? To whom should court counselling and conciliation services, if any, be available? What procedures should be used to institute counselling and conciliation? Should court counselling and conciliation services be provided on a short-term or long-term basis?

4. What staff and facilities would be required? What is the prospective cost to the State? What benefits, if any, accrue to the State and to individuals having recourse to counselling and conciliation services?

It is not possible to determine the answers to the above questions since empirical data in Canada has not been collated. Information on the types, extent, cost, and effect of family counselling and conciliation is lacking. The writer must accordingly have recourse to the wide range of diverse opinions on the aforementioned questions.

1. What types of counselling and conciliation services are envisaged? Should counselling be directed at promoting reconciliation and preventing divorce, or should it be directed at conciliation of collateral matters, such as inter-spousal maintenance, property settlements, child support, custody and access, and other issues incidental to divorce where reconciliation is impossible, or should it be directed at both?

The writer submits that the State should encourage the establishment of adequate counselling services in order to promote the constructive resolution of matrimonial and familial problems. In its broadest dimensions, such counselling services should include facilities for (i) pre-marital counselling, (ii) family counselling and conciliation where discord has arisen, and (iii) post-divorce counselling.

(i) Pre-marital counselling

The writer has previously expressed the opinion that the responsibility for providing pre-marital counselling should not fall upon the

staff of the Family Court. (375) The provision of pre-marital counselling should be viewed in the broad context of a comprehensive programme of family life education. The writer does not propose to examine this subject under the present terms of reference. Suffice it to say that opinions concerning the efficacy of such programmes are divided. The dilemmas are implicitly defined in the following observations of Professor Robert J. Levy:

"Premarital Counseling—There seems to be fairly general agreement that many of the causes of marital instability, especially among young spouses, may be ameliorated by a broad program of family life education in the public schools. ...Needless to say, the efficacy of [family life] educational programs has yet to be tested; nor will the programs be tested empirically for some time—family life education programs have not yet won even widespread acceptance.

A number of questions about a compulsory premarital counseling program deserve mention. In the first place, there is good reason to doubt, as did the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York, the community's willingness to accept the necessary strictures:

'Our Special Committee suggests that there be evolved some type of community action to establish advance counseling prior to marriage. We are not sure that any statute directed toward this end would be acceptable to the community; but the subject could be undertaken by voluntary effort of the parents, the clergy and the schools. We do not recommend the enactment of a statute...'.

The doubts relate to two issues: (1) Would such a program be useful; (2) would its methods be acceptable, even if successful? There is certainly reason to reserve judgment about the efficacy of the program. A couple whose decision to marry has already been made, now approaching the governmental ('bureaucratic') formalities, will not be easily dissuaded even if every objective person would predict that their marriage is likely to be unhappy and unstable. Although there may be some basis for believing that counseling skills will be greatly improved as the result of on-going research in marriage formation and marital interaction, present predictive skills are fairly primitive—especially when the concern is with individual couples rather than broad groups. Moreover, even if compelling attendance at one or more counseling sessions can command broad acceptance, it is unlikely that legislation permitting greater compulsion would find support. Since the marriage counselor's powers will be limited to persuasion, then, premarital counseling will soon become either an empty formality or a witless harangue by the counselor likely only to offend the prospective spouses. Indeed, considering the matter in purely economic terms—will the investment result in a product of sufficient value?—such a broad-scale program seems unwise. Even if there were sufficient trained personnel to man the program—and there clearly are not—counseling would be provided to a great many couples whose marriages are not likely to be unstable. (The test of instability for this purpose has to be whether the marriage will probably break down; it may be the case that all couples could or would profit from such counseling—but the social problem which the program is aimed at is the marriage which results in separation and/or divorce.) At the very least, then, premarital counseling, if it is to be a community responsibility at all, should be restricted to potential 'trouble' cases—very young applicants, perhaps, and couples one of whose members has previously been divorced." (376)

(ii) Family counselling and conciliation where discord has arisen

There may be a tendency to assume that the role of counsellors⁽³⁷⁷⁾ in a Family Court is to promote the reconciliation of spouses and to prevent divorce. Such an assumption is misplaced since counselling methods and procedures do not generally permit a segregation of the counsellor's functions into sub-categories such as "reconciliation counselling" and "conciliation counselling". The typical role of the counsellor is exemplified in the following description of counselling in the Toledo Family Court:

"When the petition is filed, the couple concerned are encouraged, but not compelled, to consult the marriage counsellor to see if a reconciliation can be effected. If the counsellor succeeds, all well and good. If he does not succeed in achieving a reconciliation, his function has not ceased; he can still help the parties to work out ancillary matters such as property settlements and child custody in an amicable and informed manner instead of leaving it to the judge to decide in an atmosphere of semi-hostility between the parties. The process is one of helping the parties to help themselves; they are encouraged to withdraw their problems from the sphere of public decision and be guided in working out their future by private arrangement, so far as is legally possible.

In striving to get the parties to come to an amicable settlement, either completely or in part, the idea of adversary proceedings is played down as much as possible." (378)

The above description of the dual role of the counsellor

in the Toledo Family Court substantially corresponds to that of the counsellor in the Los Angeles Conciliation Court. Thus, Meyer Elkin has observed:

"There is an area of service in our Court which does not lend itself to statistical measurement, but nevertheless, is observed by the Conciliation Counselor and might be called 'closing the book gently' counseling. These gains are found among the families who are unable to reconcile. They include the following: if a divorce appears inevitable, the counseling experience may result in less hurt for the marriage partners and the children, if needless hostility and unpleasantness can be avoided. A divorce legally ends a marriage relationship, but does not necessarily completely end future contacts and relationships where there are children. The counseling process may result in the acceptance of the decision to divorce and constructive planning relative to divorce proceedings, thereby largely eliminating extended court hearings and future court appearances after divorce. Many attorneys report to us that as a result of our counseling sessions, where the parties are unable to reconcile, they were able to amicably work out a property settlement." (379)

Advocates of the concept of unified Family Courts have consistently affirmed that the role of the counsellor should extend beyond "marriage counselling" into "conciliation counselling" or divorce counselling. For example, Professor Herma H. Kay, in commenting on the proposals of The Governor's Commission on the Family, California, 1966, has observed:

"If the parties have decided not to undertake reconciliation counseling, or if they have done so and decided not to reconcile, they may, in continuing their application for an inquiry into the marriage with a view to its dissolution, undertake further consultation with the court's professional staff for the purpose of working out the best adjustment possible of the social and psychological circumstances attendant upon the dissolution of their marriage. This

aspect of the Commission's recommendations should be viewed as providing divorce counseling, rather than marriage counseling. To be sure, couples who have tried reconciliation counseling but have decided not to reconcile may already have gained important insights into new problems likely to confront them after their marriage is dissolved. Experience reported from courts specializing in reconciliation counseling indicates that couples who did not repair their marriages were nevertheless able to work together with less hostility to plan their future and that of their children after counseling. ...Divorce counseling has a second, equally vital function: that of helping the spouses gain insight into the reasons for their marriage failure so that they may perhaps be better able to avoid repetition of the disastrous pattern in their next relationship." (380)

Elizabeth and Richard Dyson, who have expressed serious doubts as to the efficacy of therapeutic services in the nature of marriage counselling and short term psychotherapy, (381) have also observed:

"Aside from the significance of reconciliation figures, the view that the success of a marriage counseling service is measured by the number of reconciliations effected is not one with which all professional marriage counselors agree. Some see their chief function as getting parties to understand themselves and the problems they would have to conquer if they stayed together; others tend to concentrate on individual therapy designed to eliminate personality problems causing break-up of the marriage; still others focus primarily on the adjustment problems that may be encountered after divorce. Although marriage counselors do not always agree on the extent to which they are morally responsible for trying to preserve a marriage, most of them feel their goal is helping two people to maintain personal integrity—even if this means helping them to separate more gracefully from each other. A professional marriage counselor has phrased it thus:

' I counsel the spouses as persons and help them evaluate their interactions with each other. This may lead to improvement in the marriage or to the awareness of insurmountable incompatibilities and dissolution of the marriage....My primary focus is upon the dignity and satisfactions of the individual spouses....'

To the extent that family courts expect a major emphasis from counselors on merely lowering the divorce rate, there should and will be conflicts of philosophy between judges and counseling staff." (382)

In light of the above analysis of the role of the counsellor, attention may now be addressed to the question previously posed, namely, whether counselling should be directed at promoting reconciliation and preventing divorce, or at conciliation of collateral issues incidental to divorce, or at both.

Sections 7 and 8 of the Divorce Act, R.S.C., 1970, ch. D-8⁽³⁸³⁾ specifically encompass "reconciliation counselling" but experience seems to indicate that these provision have been of limited value and that more substantial benefits might accrue from legislative endorsement of "conciliation counselling". Thus, David Farrell, of the Divorce Counselling Unit, Department of National Health and Welfare has stated:

"Results of investigations to date seem to indicate that the reconciliation provisions of the Divorce Act have led to very few meaningful attempts at reconciliation by parties to a marriage. This appears to result from the circumstances under which reconciliation is expected to take place. There are a number of factors mitigating against efforts aimed at reconciliation under Sections 7 and 8 of the Divorce Act. Some of these factors are:

- (a) the late stage at which attempts to reconcile are expected to take place;
- (b) the absence of skilled counselling services within the legal system;
- (c) the lack of enterprise by many counselling agencies in interpreting their services to the general public and to potential sources of referral;
- (d) the absence of standards for marriage counsellors;
- (e) difficulty on the part of many lawyers and judges to understand or recognize the value of skilful counselling for parties experiencing marital difficulties;
- (f) the lack of adequate counselling services in many locations and in other locations the overburdening of counselling services with resultant delays in obtaining service.

A number of steps can be taken to make reconciliation a more viable prospect under the Divorce Act. While some of these steps would be long-term others could be taken immediately. Perhaps the most urgent need is to educate the legal profession as to the benefits of counselling for persons experiencing serious marital difficulties.

Other steps that might be taken include the staging of seminars or high level consultations involving parties interested in marriage counselling, the establishment of pilot projects to test certain theories regarding counselling within the court system and the use of volunteer counsellors, the setting of standards for marriage counsellors, the presentation of courses in family life education and marriage preparation in communities and within the school system and suggesting amendments to the Divorce Act which would have the effect of stressing the social implications of marriage breakdown and removing the connotations of guilt and punishment inherent in the adversary approach of the present Act.

One of the most common criticisms of the Divorce Act by marriage counsellors and social workers is the lack of a provision in the Act which would have the effect of encouraging parties contemplating divorce to seek counselling assistance designed to enable the parties to understand and adjust to the changes whether emotional, social, financial or otherwise, which will occur upon the granting of a divorce. Such counselling would help the parties to part on a more amicable basis and better prepare them for the adjustment to single life or later remarriage if such is contemplated. It might even cause the parties to have second thoughts about divorce and lead to an attempt to give their marriage a second chance.

While the Divorce Act could be amended to provide for counselling to parties contemplating divorce much more is needed if a serious attempt is to be made to enrich and sustain married life and thereby minimize marriage breakdown. The optimum approach would be to provide family life education in school, pre-marriage instruction immediately prior to marriage, counselling at the early stages of marital difficulties and further counselling at the time divorce is contemplated if divorce is found necessary. On the basis of its jurisdiction over marriage and divorce under the B.N.A. Act, the federal government could provide initiatives with regard to a broad range of activities designed to minimize marriage breakdown.

When introducing the Divorce Bill in the House of Commons in December of 1967, Justice Minister Trudeau made the following statements regarding the federal government's interest in the maintenance and continuation of marriage:

'The government is fully conscious of the important public interest that exists in our society in relation to the maintenance and continuation of marriage and the family unit, where this is possible. The salvaging of marriages is at least as important as the burying of dead marriages that cannot be salvaged. However, a bill directed to the subject of divorce

is not necessarily the most appropriate or only vehicle that can be employed to strengthen and give substance to the marriage estate. The government recognizes that financial assistance and encouragement may well be necessary to develop adequate counselling and other agencies that are necessary to deal with faltering or broken marriages and it is the intention of the government to keep this most important matter under continuous review.'

On the basis of information gathered to date, including the comments and suggestions of a wide cross-section of people engaged in family law, pre-marriage instruction, marriage counselling and family life education, it is evident that federal initiatives are required to stimulate and encourage efforts to enrich family life, minimize marriage breakdown and adequately protect the interest of children. It has been suggested that the federal government could amend existing legislation such as the Divorce Act or enact new legislation such as a Marriage Act to accomplish the above objectives.

The Divorce Counselling Unit was established to help the Department of National Health and Welfare carry out certain specific responsibilities under the Divorce Act. In carrying out these responsibilities it has become clear that counselling is not being used to the extent it can or should be for parties involved in divorce proceedings. What is needed most at this time is well directed and properly financed activity designed to stimulate the use of counselling. The rationale for this activity would be twofold, (1) to help parties overcome the serious problems inherent when marriage is under strain and (2) to minimize social assistance payments for persons suffering from the effects of marriage breakdown.

Some lawyers with extensive experience in family law have suggested that counselling should be made mandatory as a procedural matter in all divorce actions with emphasis on conciliation rather than reconciliation. In economic terms counselling should be considered as a preventative measure designed to influence parties to settle their marital problems on an amicable and reasonable basis thereby lessening the likelihood of dependency on public assistance at a later date. Reports from public assistance authorities indicate that separated, divorced and deserted wives and their children are a great financial burden on society.

Recommendations

While it would be desirable to provide counselling services to all persons contemplating divorce, this is not practical or possible due to the lack of skilled marriage counselling facilities in many parts of the country. With proper encouragement and allocation of financial resources from appropriate funding authorities it should be possible, at some point in the future, to provide adequate counselling for all persons involved in divorce actions.

For the present it would appear desirable to have the reconciliation provisions of the Divorce Act expanded to encourage parties involved in divorce proceedings to seek counselling assistance designed not merely to effect reconciliation but also to help in coping with difficulties that often arise during and after divorce proceedings. The Act should require lawyers and judges to raise the matter of counselling in a broader form than presently set out in the Act.

The following paragraph, taken from a report prepared in June 1972 by the Family Services of Eastern Nova Scotia, illustrates the need for a broader approach to counselling under the Divorce Act.

'In interviews with lawyers who handle divorce cases, we find that they rarely refer couples because in their opinion reconciliation is not always feasible. This leads us to believe that the general public often view marriage counselling as being limited only to reconciliation. But it should be noted that counselling can serve to alleviate the suffering inherent in the impact of the crisis that often means a threat to the life goals of the partners in marriage as well as those goals of the other members of the family. Counselling in the case of separation can make for constructive planning. We have often observed that this period is characterized by tension and awakening of unresolved problems from both near and distant past. At this time of crisis and emotional stress a counsellor is in a position to gain a conscious grasp of the total situation in order to enhance purposeful problem solving. It shall also be noted that clarification of the precipitating stress is in itself of therapeutic significance.'" (384)

The experience in Canada may be compared with that in England where statutory provisions and practice directions regulate both "reconciliation counselling" and "conciliation counselling". E. J. Griew has observed:

" (III) Section 3 of the Divorce Reform Act

Section 3(1)

Section 3(1) of the Divorce Reform Act provides:

'Provision shall be made by rules of court for requiring the solicitor acting for a petitioner for divorce to certify whether he has discussed with the petitioner the possibility of a reconciliation and given him the names and addresses of persons qualified to help effect a reconciliation between parties to a marriage who have become estranged.'

Rules of court have provided a simple form of

certificate ('I...have/have not discussed. ... I have/have not given....') to be filed with the petition.

In the early days of the Act at least many solicitors regarded themselves as obliged by section 3(1) to discuss reconciliation with a prospective petitioner and to give him the names and addresses of appropriate agencies. There was no reason for them to think so. An attempt to dispel this impression was made by Sir Jocelyn Simon P. in a Practice Direction [1970] 1 All E.R. 63 on the subject of the subsection: 'It is important that reference to a marriage guidance counsellor or a probation officer should not be regarded as a formal step which must be taken in all cases irrespective of whether or not there is any prospect of reconciliation.' The crucial work 'whether' in the subsection was deliberately used in preference to 'that.'

The practical effect of the subsection may be very limited. It provides a statutory incentive to do what self-respecting solicitors claim always to have done spontaneously—namely, to ensure, when necessary and so far as they can, that divorce is genuinely desired and unavoidable. In fact the general impression is that, when a spouse has got so far as to consult a solicitor with a view to instituting divorce proceedings, prospects of reconciliation in any sense are usually very small. The number of such spouses whose marriages still offer hope and will be saved because of the obligation now imposed upon the solicitor at least to set the mind and therefore possibly the conversation on the right course is a matter for idle speculation.

The Law Commission referred to the corresponding Australian provision, which is in mandatory terms. They thought the value of such a provision to be,

'not so much that a reconciliation is likely to be effected at that late stage of the matrimonial differences, but rather that it ensures that all solicitors have ready to hand a list of marriage guidance organisations, so that this can be given to those clients.

who consult them at an earlier stage.'

It is a *devious* idea. The effect of the provision may indeed be largely educational.

The Practice Direction already referred to lists

'organisations and persons [who] will be regarded as persons qualified to help effect a reconciliation for the purpose of [section 3]: any marriage guidance council affiliated to the National Marriage Guidance Council; any centre of the Catholic Marriage Advisory Council; the Jewish Marriage Education Council...; and any probation officer. It is emphasised that the list is not exclusive. ...'

Section 3(2)

'If at any stage of proceedings for divorce it appears to the court that there is a reasonable possibility of a reconciliation between the parties to the marriage, the court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a reconciliation.

The power conferred by the foregoing provision is additional to any other power of the court to adjourn proceedings.'

Experience suggests that [these provisions] remain in the realm of 'pious hope.' The reference is to the corresponding, more elaborate, provisions of Part III of the Australian Matrimonial Causes Act 1959-66. 'It is only on the rarest occasions that attempts are made, pursuant to Part III, to effect a reconciliation after the hearing has begun, and it is doubtful if any such attempt has been successful.' It is not only that the prospect of reconciliation is tiny once the case has reached court. If hope exists and is recognised by the parties (or the only party) before the court, the court needs no statutory power to adjourn the proceedings by consent. If, on the other hand, the parties do not express their readiness to co-operate, the

use of a power to impose an adjournment so that an attempt at reconciliation may be made is not indicated. The first requirement for effective marital therapy is the voluntary participation of the client. Indeed, if any party before the court does not consent to an adjournment offered rather than imposed, it is not clear that 'a reasonable possibility of a reconciliation' will have appeared to bring alive the statutory power to adjourn. Thus it is arguable that section 3(2) is mere window-dressing, adding to the supposed emphasis on reconciliation in the Act.

A further Practice Direction [1971] 1 W.L.R. 223, [1971] 1 All E.R. 894 announced a machinery for giving effect to section 3(2). This involves the court's reference of the case to the divorce court welfare officer. That officer's discussions with the parties may lead him to report to the court that there is no reasonable prospect of reconciliation. If he decides that there is a reasonable prospect, he will either deal with the case himself or 'refer the case to...a probation officer, ... a fully qualified marriage guidance counsellor, or...some other appropriate person or body indicated by the special circumstances (e.g., denominational) of the case.'

The same machinery is at the same time provided for the purpose of conciliation in relation to ancillary proceedings, for

'even if complete reconciliation cannot be achieved, expert help will often enable the parties to resolve, with the minimum possible anxiety and harm to themselves or their children, many of the issues liable to be ancillary to the breakdown of a marriage. Short of this, it should at least identify the issues on which the parties remain seriously at variance and on which in consequence they require adjudication of the court.'

In the case of either kind of referral (for attempted reconciliation or for ancillary-issues conciliation) the person to whom referral has been made will report to the court welfare officer and he will report to the court. 'These reports will be limited to

a statement whether or not reconciliation has been effective, or to what extent (if at all) the parties have been assisted by conciliation to resolve their disputes or any part of them by agreement.'

The provision of machinery for ancillary-issues conciliation is a development quite outside the contemplation of section 3(2). An amendment to the Divorce Reform Bill to widen section 3(2) so as to provide for adjournments for the purpose of such conciliation was proposed at the suggestion of the National Marriage Guidance Council. But no new statutory power to order adjournments for this purpose was needed and the amendment was not pressed. In the result the Practice Direction is a significant judicial-cumadministrative supplementation of a rather barren legislative achievement. It is likely to prove a good deal more fruitful in its application to ancillary issues than in its section 3 application.

Conciliation and counselling

The conception in general emerging from section 3(1) and (2) and the Practice Directions is that of a process of conciliation of which the hoped-for outcome will be the reconciliation of the parties' differences or some of their differences. So far as appears on the face of the two subsections and the two Practice Directions, the processes in contemplation are much the same whether they derive from a solicitor's referral to 'persons qualified' before petition or from a court's adjournment: or (in the latter case) whether what is pursued is the possibility of a wholesale reconciliation or that of a more limited resolution of matters in dispute. The last of these cases will certainly be one where a conciliator sets out with the explicit aim of reducing differences. Or rather, the counsellor or probation officer to whom the divorce court welfare officer has referred a case because 'conciliation might assist the parties to resolve their disputes or any part of them by agreement' will hardly be doing the job expected of him if such resolution is not his goal. And the subsections and directions do not themselves tend to induce a different expectation when a solicitor refers his client to 'persons qualified to help effect a reconciliation between parties to a marriage who have

become estranged.' Some solicitors may anticipate that persons receiving such referrals will be committed to reconciliation as their task; and that, at least if they obtain the co-operation of both parties, the method they employ will be one not misleadingly called conciliation. Clients too may be led to entertain such expectations. Something of a misconception would then be involved, about the processes of modern marital therapy and the trained dispositions of its practitioners.

Perhaps some 'persons qualified to help effect a reconciliation' will have a positively conciliatory approach. But many will tend not to. Outside the probation service, the largest group of specialists in this field are the counsellors of the marriage guidance councils affiliated to the National Marriage Guidance Council. These bodies declare a belief in the value of marriage as an institution. But this does not mean that their counsellors, dealing with particular spouses or couples, begin with any assumption as to the desirable outcome of their work—that the client should opt for marriage rather than divorce that the couple's decision to stay together will constitute 'success' for the counselling or their decision to part 'failure.'

The counsellor's primary responsibility is to the particular client. His aim, in the discharge of that responsibility, is to help the client to an understanding of his feelings and behaviour and, of course, of the marriage relationship, so that the client may, under 'non-judgmental' and 'non-directive' guidance, see his way towards self-determined modifications of behaviour and of attitude. It is naturally not merely incidental that in a great proportion of cases the counselling operates in this way through the client to the marriage, presumably (if the language of advantage and disadvantage may properly be used) to the marriage's advantage more often than not. This is because the marriage is the focus of attention and because most clients who come to a marriage guidance council presumably want their marriages to last and to improve—a pre-disposition that must tend towards 'success'. Thus the avoidance of divorce may be the product of counselling. But it is not, for the counsellor, the aim; it may not, in the particular case, be a desirable outcome. The counsellor

can hardly help his clients to determine for themselves what is best for themselves if the 'best' is pre-determined.

If conciliation is the nature of the process, reconciliation is a pre-determined 'best.' But the process is not conciliation; it is counselling, which is very different. Marriage guidance counsellors are, of course, 'qualified to help effect a reconciliation' between estranged spouses, in the sense that if the parties desire an improvement in their relationship they can be helped by counselling to an insightful use of their own resources in the service of that relationship. What the spouses will be unlikely to get from a counselling service will be *advice* on how to behave, *suggestions* for so much give and so much take or participation by the counsellor in a process of mediated *bargaining*. The counsellor is not a matrimonial trouble-shooter. He is unqualified to help in that sense to effect a reconciliation.

Some implications of the nature of counselling

The nature of counselling is relevant in a variety of theoretical and practical ways to the themes of this article.

First, it is relevant to the primary meaning of 'reconciliation' that I have offered as being appropriate in the context of the reformed divorce law. Counselling will tend towards the improvement of the marital relationship in the long run rather than merely towards a decision to 'make a go of it.' Under the influence of a short experience of counselling, indeed it is common enough for spouses in conflict to achieve a 'honeymoon' period in which the apparent sources of conflict seem no longer to exist or at least seem to be tolerable within a restored marriage. This 'honeymoon effect' may be misleading, at least to the parties and to their legal advisers and the court. The marriage may have a present but as yet no assured future. The honeymoon *may* last, or at least subside to an acceptable married state; and this may happen with or without continued counselling and support. Or renewed breakdown may shortly occur, publicly or in a private hell shared by the parties.

It is too early to speak complacently of 'reconciliation.' No doubt, however, within the meaning of section 3 a 'reconciliation' will have been 'effected'; and if so there is a conflict between the broader context of the Act and its encouragement of reconciliation on the one hand and the specific provisions concerned with reconciliation on the other.

Secondly, there is some confirmation of this conflict in the remaining provisions of section 3. Subsections (3) to (5) in effect permit cohabitation between the spouses for limited periods without peril to accrued or accruing rights to divorce. The fact that the spouses live with each other for six months or less after the petitioner learns of the respondent's adultery is to be disregarded in determining whether the petitioner finds it intolerable to live with the respondent, although if they live with each other for more than six months the petitioner cannot rely on that adultery for the purpose of section 2(1)(a) (subsection (3)). Living with each other for up to six months after the last incident relied upon under section 2(1)(b) is to be disregarded in determining whether the petitioner cannot reasonably be expected to live with the respondent (subsection (4)). The effect of subsection (5), finally, is that the parties may resume living with each other for a period of, or for periods totalling, not more than six months without affecting the continuity, for the purpose of section 2(1), of a period of desertion or living apart (calculated without including the period or periods of cohabitation).

It is not stipulated that the 'living with each other' shall have been with a view to, or in an attempt at, reconciliation. So to have provided would have been to perpetuate the problem confronted in *Brown v. Brown* [1967] P. 105 under the Act of 1963. But these subsections are 'designed to encourage reconciliation' or at any rate intended to permit its uninhibited pursuit. The difficulty is that effective processes of marital therapy cannot be confined within

short periods, and section 3 reflects an inadequate conception of those processes. The solicitor referring his client to a marriage guidance council is constrained by section 3 to expect quick results, if any. He and his client must keep their eyes on the calendar. But 'marriage counselling is likely to be less effective if undertaken under conditions which limit the time available for it.' The time limit may be very strict if the client has delayed his approach to the agency or the agency's waiting list has caused time to elapse between that approach and the start of counselling. The relationship between the spouses may well be incapable of being restructured either during the short time they are permitted (without prejudice to a divorce) to live together or while they are living apart.

It is submitted that consideration might be given to the improvement of this aspect of section 3. One limited possibility might be the supplementation of subsections (3) and (4) by a provision to the effect that, for the purposes of section 2(1)(a) and (b), there should be disregarded any period during which the petitioner lived with the respondent while bona fide seeking or obtaining help from a suitably qualified person in order to investigate the possibility of improving, or for the purpose of improving, the marital relationship. Such a period could begin with the first application to the relevant agency for an appointment. It would last while the client waited for a first appointment and so long thereafter as he or his spouse continued to make appointments (with the consent of the agency) which he or she intended to keep. It is not denied that this suggestion presents difficulties. It risks the possibility of collusion between counsellor and client, or manipulation of the counsellor by the client, in the making and keeping of appointments solely to preserve cohabitation and the right to divorce. It also risks opposition from the agencies themselves as potential witnesses to the making and keeping of appointments, though there would seem to be nothing objectionable from anyone's point of view in a provision that an appropriate certificate from the agency should be conclusive evidence of the date of first contact and either of the fact that no appointment had been offered at the date of the certificate or of the date of

the last appointment made by either spouse." (385)

The problems arising from the correlation between "reconciliation counselling" and "conciliation counselling" have been examined by Jon M.A. McLaughlin in a comment on the system operating in the New York Family Court. He has stated:

"Many problems have arisen making it difficult to sort out the lessons of the New York experience. The New York legislature failed to decide the vital question: whether the purpose of the state marriage counseling service should be conciliation, reconciliation or both?

Conciliation involves exploring, clarifying and helping the couples to resolve for themselves their marital problems and collateral issues without any urging upon them of continuation of the marriage or divorce. Reconciliation, on the other hand, means salvaging marriages. It involves a value judgment by the state that at least some marriages should be saved and gives counseling personnel the more manipulative job of persuading appropriate parties to continue their marriages.

New York legislators left the question open by leaving the function of commissioners and counselors wholly unclear. After initial conferences, commissioners may refer parties to counselors if 'further conferences will be beneficial and may result in the continuation of the marriage.' This provision outlining the commissioner's role appears to indicate that continuation of some marriages, or reconciliation, is the goal sought by the legislature. But, it is uncertain whether the rule of *expressio unius est exclusio alteram* applies and the commissioner should refer only if convinced, or reasonably sure, that the marriage is salvageable.

The statute outlines the counselor's role by telling him to 'do such acts as he feels necessary to effect a reconciliation.' But the statute adds, 'or [effect] an adjustment or settlement of the issues of the matrimonial action.' The statute thereby specifically authorizes further counseling, by counselors rather than commissioners, when the marriage seems dead; but apparently only then to eliminate 'issues' of the legal action such as, presumably, custody or alimony disputes.

The legislative failure to make explicit the goals of the service has been paralleled by the administrative failure, in the three bureaus studied, to specify the purposes of the service on the preliminary questionnaire or other form.

One result of the legislative and administrative failure to specify purposes has been the confusion of citizens involved in matrimonial actions. In the three bureaus examined commissioners and counselors reported that ignorant parties repeatedly began initial conferences with them under the anxious impression that they would be asked or even forced to relinquish their legal actions and to reconcile. This may reflect a failure of counsel to explain the procedure. It is submitted that advance notice, possibly on the questionnaire form, that the state is interested in helping citizens understand and cope with any marital problems regardless of the outcome of the litigation would help to dispel such notions. This might also increase the parties' willingness to consider alternative solutions to their difficulties at a time when the notion of reconciliation is apt to arouse the resistance of at least one of the spouses. Conscientious counsel or the Commissioner at the initial interview could also alleviate much of the confusion.

Marriage counseling subsequently undertaken for the sole ostensible purpose of reaching satisfactory arrangements concerning such issues as child custody or alimony could either lead to workable arrangements or to reconciliations. Similar outcomes could result from marriage counseling undertaken to determine whether divorce is really desired or to determine what went

'wrong' to obtain insight which could contribute to the success of a future marriage. To the extent that couples and bureau personnel have viewed the purpose of New York's service as one of reconciliation, some couples may have been repelled by it and attempted to avoid initial conferences or further counseling sessions thus discouraging potential successful reconciliations." (386)

McLaughlin subsequently concludes that:

"1. The legislature should provide that the goal of marriage counseling is to clarify marital problems and to allow spouses to resolve these problems without concern for the possibility of reconciliation. Only the spouses seem qualified to judge whether a reconciliation is best for them." (387)

This writer endorses the above opinions and concludes that the current provisions of the Divorce Act, R.S.C., 1970, ch. D-8 are inadequate and that legislation should specifically reflect the philosophy that counselling cannot be sub-divided into separate categories such as "reconciliation counselling" and "conciliation counselling" and that the role of the counsellor is to assist in the resolution of matrimonial and familial problems irrespective of whether this leads to the preservation of the marriage or family unit or to its dissolution and disintegration.

Two important correlative issues require further consideration. The first relates to the need for amendment or reform of the law in so far as it precludes the remedy of divorce in circumstances where the spouses continue or resume cohabitation while receiving counselling. The second relates to the law of evidence and more specifically to confidential and privileged communications. (388)

In the former context, readers will recall that E.J. Griew recommended that consideration be given to enacting supplementary statutory provisions in England, whereby cohabitation during any period of counselling should be disregarded in determining the right to divorce. Similar issues arise in the context of the Divorce Act, R.S.C., 1970, ch. D-8 and warrant consideration. The writer is of the opinion, however, that this matter should be deferred pending submission of a report on Divorce Reform in Canada.

In the context of confidential and privileged communications, section 21 of the Divorce Act, R.S.C., 1970, ch. D-8 provides as follows:

"21.(1) A person nominated by a court under this Act to endeavour to assist the parties to a marriage with a view to their possible reconciliation is not competent or compellable in any legal proceedings to disclose any admission or communication made to him in his capacity as the nominee of the court for that purpose.

(2) Evidence of anything said or of any admission or communication made in the course of an endeavour to assist the parties to a marriage with a view to their possible reconciliation is not admissible in any legal proceedings." (389)

This writer is of the opinion that any privilege or prohibition recognized in the context of "reconciliation counselling" should extend to "conciliation counselling". This opinion is apparently shared by Judge H.A. Allard who has observed:

"The Manitoba Corrections Act 1966 [now R.S.M., 1970, c. C-230] has provided some remedy to the dilemma of pre-trial counselling by setting out the basis for the probation officers' assistance and by providing that communications are privileged. Section 4, sub-ss. 3 and 4, reads as follows:

- '(3) In addition to the powers and duties of a probation officer mentioned in subsections (1) and (2), a probation officer may, upon the request of a member of a family, and before the institution of any proceedings before a family court, endeavour to solve the domestic problems of that family by giving to them such counsel, advice and guidance as, in his opinion, is likely to solve those problems.
- (4) Any information and communication obtained by a probation officer while acting under the scope of the authority of subsection (3) is privileged; and a probation officer in possession of any such information or communication is not a competent or compellable witness for the purpose of disclosing the information or communication in any proceedings before any court.'" (390)

The view that confidentiality should extend to statements or admissions made during the course of counselling or conciliation was also legislatively endorsed in the New York Family Court Act 1962. Thus, Justice William B. Lawless has observed:

"The legislature implemented this provision by enacting Article 9 of the Family Court Act which makes available an 'informal conciliation procedure to those whose marriage is in trouble,' and gives the family court original jurisdiction over proceedings. All statements made in these proceedings are confidential and are not admissible in evidence in any subsequent proceeding or action." (391)

It is submitted that a logical extension of the reasons underlying the concept of confidential and privileged communications compels a segregation of counselling and investigative services in or available to Family Courts. In the Report of The Governor's Commission on the Family, California, 1966, it is stated:

"With respect to confidentiality, a further point must be made. We believe that the counselor's effectiveness in reconciliation counseling will be impeded if information imparted to him by the parties in the course of such counseling is not made privileged. The possibility that the counselor might be required to divulge to the Court such personally sensitive disclosures as the process would necessarily involve could only result in a lack of confidence on the parties' part, and a consequent unwillingness to utilize conciliation counseling services. We therefore recommend that where the spouses continue counseling (under our proposed enactment, for a period not to exceed sixty days from the date of filing of the petition of inquiry) with a view to possible reconciliation, all communications by either of them to the counselor be made absolutely privileged.

In aid of this reconciliation service, it may prove desirable to separate the conciliation-counseling and investigative functions, so that the same counselor does not handle both aspects of the same case if the reconciliation attempts prove unworkable. We have not thought it wise, however, to attempt to handle this separation of function by statute; we believe it is a matter best worked out by the particular judge and chief counselor as a matter of administration." (392)

Commenting on the above Report, Judge William E. MacFaden and Meyer Elkin have observed:

"The Proposed Act itself would indicate that the conciliation counselors will also be investigators (the Proposed Act eliminates appointment of Probation Officers and Court Investigators) and in those cases wherein a recommendation is made to dissolve the marriage they must then place themselves in the position of making recommendations relative to custody, property, child support and alimony. There is a danger that at this point the counselors may well be in a position of conflict, having acquired knowledge which would be useful and helpful in making such recommendations during the conciliation process at a time when all the communications by the parties are privileged and confidential. In this respect, it is believed that provisions of the Proposed Act would be damaging to the conciliation process in that counsel would have to forewarn all of the parties that information acquired by the counselors while acting in a confidential relationship might later be used in the actual court proceedings. This might well encourage a reluctance of parties to freely engage in the conciliation conferences. To protect the confidential relationship, it might be necessary to develop separate investigative staffs or to rotate the assignment of counselors to prevent any possibility of conflict. Under the Proposed Act as written every preliminary investigation must consider the possibility of conciliation, the question of custody, division of property and support and alimony. Experience has shown us that not one out of ten cases in which requests are made for the appointment of court investigators or probation officers made by attorneys and/or parties is necessary nor would the investigation if ordered be helpful or useful. Yet if every divorce case filed required an immediate investigation, the staffing requirements would be impossible both from a manpower and expense standpoint and could only result in a vast waste of public funds. We must note here that the training and experience necessary for a good marriage counselor will not qualify that

person to divide assets or determine support and alimony requirements." (393)

This writer endorses the opinions expressed by Judge MacFaden and Meyer Elkin.

(iii) Post-divorce counselling

In the Report of The Governor's Commission on the Family, California, 1966, a strong plea is entered for the provision of post-divorce counselling. The Report stated:

"It is our belief that the service of the professional staff should not terminate with the decree of dissolution of the marriage, but should extend as well to post-dissolution situations where the Family Court so directs, or the parties (or one of them) so request if the chief counselor determines that proffering of such services will not unduly burden the staff. Much of the bitterest domestic litigation involves not the divorce itself, but the inability of the parties to resolve post-dissolution crises and to adjust to the responsibilities of their new state in life. We believe that the extension of post-dissolution counseling in proper cases will reduce the venom and frequency of such crises and will be a significant stabilizing factor in situations which might otherwise erupt and set at naught much of the benefit achieved by the Family Court process. Such expressions of public sentiment as the Commission has been able to collect in the limited time available have been overwhelmingly in favor of such post-dissolution counseling; we conclude that there is a very definite need that is not presently being met.

We recommend, therefore, that the Family Court be given the discretion to order either or both parties to the marriage to continue working with the professional staff after dissolution, if the counselor so recommends; and that the staff be enabled to extend its

service if requested by either party and the chief counselor approves. As elsewhere in the counseling process, we recommend that the professional staff of the Family Court be authorized to make referrals in such cases to licensed individuals or agencies in the community for private counseling." (394)

Commenting on the above recommendation, Judge William E. MacFaden and Meyer Elkin have emphasized the need to confine such counselling to circumstances where post-divorce litigation is contemplated or instituted:

"Post-divorce counseling provided by a Family Court should be limited to those cases in which the parties are bitterly fighting to obtain a modification of prior orders made in such matters as visitation, custody, support and so on. It is well known that post-divorce litigation constitutes a significant portion of the court's civil calendar. These cases are usually very difficult to handle. The judge or commissioner hearing these cases often wishes he could refer the parties to a court counselor who would try to help the couple find a common ground on which to meet as a means of amicably resolving the issues. Here, the court counselor does have a very worthwhile function. He would probably be much more effective than a counselor seeing the couple in a non-court counseling agency. Parenthetically, it is worth noting that if the Family Court counselors are effective in the intake interview as well as in other counseling areas the parties might be involved in before the marriage is ended, then the number of families coming to the court in post-divorce matters would be reduced. This conclusion seems logical because there is much evidence that one or both parties, already divorced, and without benefit of prior counseling to help to 'close the book gently', use the court as a means of continuing the harassment and conflict which characterized the relationship of the parties when they were still legally married.

The Act opens the door too wide in the area of post-divorce counseling. Except for those cases involving post-divorce litigation as described above, it would be desirable for the court to very briefly see the parties and then refer them to another qualified community counseling agency where the parties could receive as much counseling as necessary to resolve the conflict. This position is consistent with the principle of the need for a total community effort in the area of marital conflict. A court cannot do it all and cannot be all things to all people." (395)

In a report on the progress of the counselling programme in Grand Forks County, North Dakota, O. Omlid stressed the importance of post-divorce counselling in the following statements:

"If a reconciliation takes place it does not necessarily mean that the problems have all been solved, or even that the reconciliation will long endure. Thus, counseling should be available on a continued basis to help with the realistic and emotional problems that still exist, and [sic] as these may involve the children as well as the parents. Even when a divorce takes place, the fact remains that the couple still remain the parents of the children and it is very likely they will have to communicate with, and possibly relate to, each other and the children in some manner in the future. In most instances one of the parents, usually the mother, will continue to live with the children for many years to come. In some instances the emotional maturity and adjustment of the mother will permit her to function extremely well as the only parent in the home. In other instances, the mother's lack of emotional maturity and her own personality problems, now aggravated by the divorce and the stress that brought it about, is in greater need of help at this time than she has been at any time in the past. Her emotional adjustment and

feelings about the divorce will have a vital effect upon the future emotional adjustment of her children. The children will also be affected, most likely adversely, by the absence of a father in the home (but this is not meant to imply that there are not instances in which their situation is not improved by this absence). This is often demonstrated by the couples who are referred for counseling and whose present marital problems are rooted in the personalities and problems associated with the divorce of their own parents. Counseling and other services continued after the divorce could do much to improve the mother's own general emotional adjustment and to handle the residue of unhealthy feelings left by the divorce, with the result that the mother-child relationships would be improved, the adverse effects of the absent father reduced, and the chances of another ill-advised marriage made less likely." (396)

A less enthusiastic response to proposed programmes for post-divorce counselling has been voiced by Professor Loy M. Simpkin, who has stated:

"Post-divorce counseling. No work has been found dealing with a program designed exclusively with post-divorce counseling. Most of the conciliation courts have indicated they do only limited post-divorce counseling, and generally only when there had been pre-divorce counseling of the particular couple involved. However, post-divorce explanations and counseling are often mentioned as being considered necessary and desirable. The guilt, anger, and resentment arising from divorce, as well as the heartaches arising from the battles over children, are evident to those who have handled domestic relations matters. It would be easy to make the assumption that here counseling could be most effective. This would be the same assumption that was apparently made in regard to court-connected marriage counseling. Without empirical evidence as to effectiveness or without recognizing that a program was experimental, post-divorce counseling should not be recommended." (397)

In the absence of empirical data, it is exceedingly difficult to formulate a policy decision respecting post-divorce counselling in the Family Court. If it is concluded that court counselling staff have a useful role to discharge in the context of "conciliation counselling", this role appears equally significant irrespective of whether litigable issues arise before or after judicial dissolution of the marriage.

2. Should counselling and conciliation services be established within the Family Court, be available on referral by the court, or be completely disassociated from the court?

As Professor Henry H. Foster, Jr., has observed:

"Where counseling and conciliation services exist, they usually take one of three forms: uninstitutionalized, independent, and private services; conciliation services that are organized but independent of the state or the courts; or conciliation services that are directly connected to or set up under the authority of domestic relations or divorce courts." (398)

Assuming that family counselling and conciliation services are desirable or useful, a primary issue to be determined is whether such services should be integrated, insulated or isolated, in or from the Family Court. It is, therefore, appropriate to examine the arguments for and against court counselling services. An initial question to be resolved is whether the court is a proper place for the exercise of non-adjudicatory functions. Advocates of the concept of unified Family Courts consistently assert that a court is no less a court because it applies preventive or therapeutic procedures and recognizes the value of the social and behavioural sciences and the need to employ non-legal

expertise in the search for resolution of matrimonial and familial conflicts. Such advocates further assert that the Family Court should not seek to compete with the services or facilities otherwise available in the community and that a close inter-relationship between court services and outside facilities is essential. It is generally contended, however, that exclusive reliance on community facilities is unsatisfactory by reason of (i) the reluctance of lawyers and the courts to refer clients or litigants to such facilities; (ii) the lack of motivation on the part of clients or litigants to utilize such facilities; (iii) the inability of many clients or litigants to pay fees for counselling services; and (iv) the heavy caseload of outside agencies, which necessitates delay in referrals gaining access to such facilities, and the general inadequacy of such facilities in many areas, particularly in rural or less populous communities.

Judge Paul W. Alexander, formerly of the Toledo Family Court and a leading exponent of the concept of the unified Family Court, expressed the following opinion:

"Unfortunately there are some places where there just aren't any such services; some where they are woefully inadequate; many where they are hopelessly overloaded. And often the legal client flatly refuses to go to them for help. To meet the need in such cases and to bring the services to the people instead of forcing the people to seek them out, the divorce courts themselves in a growing number of communities have been equipped to render such services, or at least some of them. These courts, especially if the juvenile court is combined with them, are known as 'family courts.'....

If anything is to be done toward screening out...unneeded and unwanted divorce cases, where better than in the court itself? If you want to dam a deluge you go where the water is. You don't build your dam some place off in the desert.

Another significant fact: in one family court where about 2,000 spouses annually file suit for divorce, at least twice that number, before filing, go right to the court with their marital troubles. But—they do not go there for divorce. They go there to avoid divorce! They walk in off the street; they phone in for appointments. Their marriage is failing or has failed; their home and family are breaking or broken. Many are distraught and desperate. This wife wants the court to make her husband quit drinking; that one wants protection against frightful beatings; the next one wants to know how to make him give up the other woman; the next one's husband won't give her any money and she is really hungry; then a husband wants to know how he can make his wife quit working; the next one has an alcoholic wife; another is sure his wife has a boy friend—what can he do about it? —and so on, with endless variations upon the central theme: human frailty leading to unhappiness, to misery, to marriage failure, to broken home. Must it always be ultimately to divorce?

These 'walk-ins' must have help, but almost none of them knows what kind of help. Furthermore, almost never does one of them realize the various kinds of help that are available. Of course the court attempts to refer all these clients to appropriate community resources. An undue proportion refuse to accept referral. These are helped by the court as fast as caseloads permit. Many of those who accept referral never get there. (They generally come back to court later as litigants.)

Somehow it seems that when almost one-third of all divorces sought turn out to be unwanted, and when over twice as many people come to court to avoid divorce as file suit to obtain divorce, the court not only may be justified in offering the nonjudicial services but may even have a moral duty to do so. It seems more sensible and simple to provide the needed service where the people are who need it. And where can one find a greater convergence of suffering spouses than in a divorce court?" (399)

The above opinion may be compared with that of Judge William E. MacFaden and Meyer Elkin, of the Los Angeles Conciliation Court, who have stated:

"The Court can only be a resource for help after the problems in the family have arisen. The Court, therefore, cannot exercise a preventive function since prevention of family breakdown requires an on-going total effort on the part of a total society. In relation to the total effort required, the Court's role therefore is a relatively limited one in that it can only deal with family problems after they have occurred and not before; it can only be one of a complex of community resources designed to deal with problems as they arise, not to prevent these problems. This is not to minimize the important role of the Court in the area of family breakdown, for a Court does have an extremely important function to perform in assisting families to explore the possibilities of restoring the marriage, and when this is not possible, to help the family dissolve the marriage with a maximum of dignity and a minimum of trauma for all parties, particularly the children. Since a marriage cannot be terminated without recourse to a legal procedure, the Court is in a more strategic position than any other community counseling agency to provide such help. There is evidence to show that most people with marital problems do not seek the services

of a trained marriage counselor but turn to others who are not trained to help people in the delicate and emotionally intense areas of married life." (400)

The above opinions were endorsed in a research study undertaken in the State of Hawaii, which led to the enactment of the Family Court Act (Hawaii), 1965. The report of this research study stated:

"The Commission on Children and Youth believes that marriage counseling services should be a part of the family court structure. The Commission is aware that available community resources should be used as much as possible in marital counseling, but it feels that a court-administered service is important in order to provide immediate services when needed. In marriage counseling immediately prior to a contemplated divorce, timing and availability of service are of utmost importance if counseling is to be successful. Also, a court-administered counseling service could be used primarily to resolve the initial phase of the difficulty. Referrals then could be made to appropriate community resources for more intensive or longer term services. Specialized services would be offered by the proposed family court in other areas including determinations of support and alimony, child custody, etc.

An effective family court would need an adequate and competent staff to administer these specialized services. The make-up and the size of the staff would depend on the extent to which the specialized services are court based. The minimum composition of the court based staff is considered to be as follows:

- a. Chief judge of the family court
- b. Judges and/or referees
- c. Chief clerk and court clerks
- d. Documents receiving clerks
- e. Bailiffs
- f. Court reporters
- g. Intake counselors
- h. Probation counselors
- i. Marriage counselors
- j. Reception - clerical - stenographic workers
- k. Fiscal section
- l. Statistical section
- m. Detention services

Specialized services such as medical, psychological, and psychiatric are essential and may be court based or community based. Of primary importance is their immediate availability. Situations involving family crises tend to deteriorate rather than improve when evaluation and treatment are delayed.

The size of the minimum staff (over and beyond the present Juvenile Court staff) would logically be determined by the workload that would be added to the current workload of the Juvenile Court." (401)

The need for court counselling and conciliation facilities has also been strongly emphasized by the Probation Officers Association, Ontario. Thus, it has been stated:

"D. COUNSELLING WHERE NO ACTION CAN BE
TAKEN IN JUVENILE AND FAMILY COURT

In about 75 per cent of our Courts, Probation Officers are instructed to offer counselling to couples where there is marital discord but where neither partner could lay a charge. Although this type of counselling has developed particularly in communities where there are no other agencies providing this service, it is also often in demand where private agencies are functioning on a voluntary basis. It has been found that the authoritarian setting of the Court enhances

the effectiveness of counselling in some cases. The voluntary agencies are aware of this and sometimes make referrals to Probation Officers for this reason. In other cases, the converse is true with counselling being more effective in the voluntary setting and these people are referred to an appropriate agency.

Counselling at this stage is more likely to be successful since the marriage has not yet deteriorated to a point where either partner can take legal action against the other. This preventive counselling often ensures that the couple do not get into legal conflict with each other.

As well as variation in the types of cases that receive counselling, there is also considerable difference in the depth of the counselling that is given. In some Courts, the Probation Officer is confined to a brief interview with the spouse who initiates the action (most frequently the wife) to assess the problem and make a referral elsewhere for action. In other Courts, the Probation Officer becomes involved at much greater depth. He will explore the marriage problem and outline the courses of action that are available weighing their advantages and disadvantages. If both parties request counselling, then the marriage is examined in order to find the areas of discord and agreement, the attitudes and desires of both parties, etc. This may involve a few or several interviews; it may also involve referral to specialists such as physicians, psychiatrists, clergy, lawyers, etc. The degree of depth of the counselling will depend on the policy of the Court and particularly on the skill of the Probation Officer.

Marriage counselling has grown rapidly as part of the service of the Juvenile and Family Courts. During 1965, there were over 12,000 couples who received some counselling by marriage counsellors in these Courts in Ontario. As well as direct referrals from the Courts, couples are being referred by the police, lawyers, doctors, clergymen and other social agencies. The need and the community

desire for this service is clearly established. Due to the rapid growth of this service, it has not been possible to obtain personnel who were specially trained as marriage counsellors. Although Probation Officers receive general training in counselling, they receive virtually no training in the highly specialized technique required for good marriage counselling. It has, therefore, been necessary for Probation Officers to develop their skills on the job with little in the way of standards to guide them. Faulty techniques and lack of skill can result in more harm being done than good.

Privately operated marriage counselling agencies do exist but only in the larger urban centres and are seldom found in centres of less than 50,000 population. These agencies do serve a useful purpose and often their service and that of the Court supplement each other. They often are best suited to couples who cannot be counselled in an authoritarian setting. They also can provide specialized services such as budget and debt counselling.

In cases of financial hardship, this service would be provided without cost but where the client is able to pay, there is usually a sliding scale of charges related to income." (402)

It should be recalled, however, that Elizabeth and Richard Dyson have expressed strong reservations respecting the utility of providing preventive and therapeutic counselling facilities in the Family Court. (403)

To repeat their submission in summary form:

"But we doubt the value of trying to offer increased and more elaborate therapeutic services, in the nature of marriage counseling or short-term psychotherapy or similar services. This is partly because many of the family court's clients do not voluntarily solicit such services, and their value may be minimal in a

quasi-compulsory setting. It is partly because white middle class social workers are often unable to reach and communicate with the lower income groups that constitute the family court's largest group of clients. It is partly because the methods and techniques of social casework are inexact and often ineffective, and even where successful, sometimes prohibitively costly. Therapy usually requires an expensive commitment of time and resources that family courts simply cannot afford to furnish, without detracting from the investigative services they perform." (404)

This writer is of the opinion that counselling and conciliation services should be available to persons having recourse to the Family Court where there is a reasonable prospect that access to such services may provide an effective alternative to resolution of the matrimonial or familial problem by judicial disposition. The writer is also of the opinion that the resources in the community are presently inadequate to assume any additional responsibility and that sufficient resources must be guaranteed to persons having recourse to the Family Court either by the provision of facilities within the court itself or in specially established clinics or departments, or by a system of purchase of services. The availability of counselling and conciliation services to actual or potential litigants must not, however, be allowed to foster delay or prejudice the rights of any affected party.⁽⁴⁰⁵⁾ Accordingly, the jurisdiction of the court to grant interim relief respecting interspousal maintenance, or custody, access and maintenance of children, must be legislatively assured irrespective of any right of recourse to counselling and conciliation facilities.⁽⁴⁰⁶⁾

If one inclines to the opinion that counselling and conciliation services should be established in the Family Court, it becomes necessary to define the criteria for such services that are most likely to promote success. Professor Henry H. Foster, Jr., has observed:

"There are many prerequisites to a successful conciliation service. The availability of marriage counselors must be investigated to ascertain if counseling in the court setting is feasible. The judge must have ultimate control over the selection of the staff and the services because conflicts can arise where the conciliation service is divorced from the court. Moreover, the judiciary must be consulted as to what is practicable in view of jurisdictional problems and the assignment of judges. The court-creating statute should provide for judges who are oriented to a sociological or case work approach, or who are ~~specialists~~ in handling family problems, although judges should avoid efforts at marriage counseling. Both parties, especially the wife, must have some motivation toward reconciliation. A cooling-off period may be useful since 'time itself can be a helpful or even therapeutic agent in harmonizing disturbed family situations'. Too long a time of separation creates an insurmountable barrier to reconciliation and a prolonged estrangement due to marital difficulties virtually guarantees the death of the marriage. In addition, undue delay may incite migratory divorce and its attendant evils. ..." (407)

In the United States two types of court structure have evolved. (408)
First, Family Courts have been established with an extensive, but not comprehensive, jurisdiction in matrimonial and familial proceedings, and these courts provide specialized investigatory facilities in an attempt to provide to a greater or lesser degree counselling and

conciliation services. In the event that counselling and conciliation services provide no solution, a trial takes place before the judge in order to secure a disposition of the conflicting or competing claims. The second type of court is the Conciliation Court that is established as a department or division of the Superior Court. Inter-spousal conciliation proceedings are instituted in the Conciliation Court and, if ineffectual, the issues are referred to the trial division of the Superior Court for judicial determination and disposition. The judge of the Conciliation Court, unlike the judge in the Family Court, discharges supervisory and supportive role in promoting conciliation between the spouses. There is a substantial body of literature on the Conciliation Courts in the United States, much of it specifically directed to the Conciliation Court of Los Angeles County, which pioneered in this context. Substantial attention has been addressed to the criteria and standards to be adopted in a Conciliation Court in order to promote the successful conciliation of disputes. In a Report of the Subcommittee on Conciliation, Family Law Section, American Bar Association, it is stated:

"The following practices and procedures have been found by courts of conciliation to (1) encourage divorce-bound couples to solicit such services; (2) effect reconciliations; and (3) insure their permanence.

1. Reconciliation proceedings should be under the jurisdiction, direct control, and supervision of an interested and dedicated Judge. It should be emphasized that the Judge appointed to preside over the conciliation court is not just a mere figurehead or supervisor. He should completely control and direct the operations of the court, announcing and enforcing policies, issuing directives, holding staff

conferences, signing orders, determining questions of procedure, and in required cases holding hearings where the plenary powers of the courts are required.

Whenever the marriage counseling phase of the process has been delegated to a nonjudicial social agency with only limited or indirect control by the court, the program too often has gotten out of hand and aroused widespread criticism on the part of lawyers, litigants and the general public.

2. Marriage counseling should not be performed by the Judge but by trained and experienced counselors under his direct supervision. The preferred qualifications for appointment as a court counselor should be a Master's Degree in the Behavioral Sciences and at least five years of counseling experience.

3. Although the Judge should rarely participate in any of the counseling procedures, he should see each reconciled couple, after they have been reconciled by the counselor, to congratulate them and to impress upon them the importance of the step they have taken and that the success of their marriage is of considerable concern to the court and the community. Good public relations, as thus practiced, brings the court close to the people and breeds public respect.

4. The procedure to invoke the court's services should be simple and direct.

In Los Angeles County couples can obtain a preliminary conference with a Senior Marriage Counselor without even filing a petition. In other words, a divorce-bound couple can literally walk into the court 'off the street,' so to speak. This often leads to the filing of a petition.

Provisions should be provided for a petition to be filed *prior to* or *after* a divorce action has been instituted. Even where parties are in court for a pendente lite order, the Judge or Commissioner refer the couple for an exploratory conference with a counselor without the necessity of filing a petition.

All of these simplified procedures, making the court readily accessible, encourages utilization of its services, promotes understanding, and results eventually in reconciliations.

The pressing marital problem of most couples, like a ruptured appendix, needs immediate attention. Too often undue delay results in the death of the marriage through further estrangement and divorce.

As heretofore emphasized, complicated procedures, in other words involved red tape, is not appealing to lawyers, whereas simplified procedures meet with approval.

5. No filing fees should be required, and no charges made for marital counseling, thus removing a further impediment to soliciting the court's assistance.

6. The court files, including the counselor's written reports, and all written and oral communications to the counselors, should be made confidential by law. Counselors maintain strict neutrality, thus providing a uniqueness and integrity to the proceedings which immediately instills confidence and trust in the parties.

7. Attorney's fees should be awarded upon proper application. This has created a favorable impression among members of the bar. There is no reason why an attorney, who devotes office conference time to the parties and prepares the petition and supporting affidavit, should not be compensated.

The policy of waiving an attorney's fee where the parties reconcile is misplaced generosity and poor psychology.

8. The Court should not engage in continued marriage counseling to a couple in need of it. This, as we view it, is beyond its scope and purpose. A cooperative and complementary relationship with the various family service agencies in the community, which take those cases needing additional counseling on a priority basis and for a nominal fee promotes harmony between

the Court and these agencies.

The Court can also be of considerable assistance to the family service agencies. Possessing no power to force a recalcitrant spouse into counseling, the social worker can suggest to the party desiring a reconciliation the filing of a petition in the Conciliation Court, which can require the appearance of the other party.

9. Considerable controversy exists in the field of reconciliation procedures as to the desirability or propriety of the use of any coercion whatever in the conciliation process. Many social workers find the use of coercion repugnant or ineffective. However, experience has proved that what might be termed 'gentle judicial coercion' plays an important role in effecting reconciliations.

An embittered husband or wife, due to pride, may feel that the initiating of overtures toward "talking things over" means a loss of face, although secretly desirous of mending the marriage.

A court notice requesting an appearance of a spouse (and if refused, ordering the appearance) is a means of saving face, and in many instances is effective in saving the marriage.

10. Every effort should be made to limit the number of cases referred to counselors. No counselor should be assigned more than three or four cases per day. Marriage counseling cannot be conducted on a conveyor-belt system, and a fatigued and harassed counselor, who is forced to squeeze in five or six cases in his conference calendar each day cannot possibly hope to be effective.

11. Widespread community publicity concerning the existence of the Conciliation Court, its procedures and functions, are of great importance. In 1959, pursuant to Rule 6 of the Superior Court, in Los Angeles County each divorce complaint is required to contain the names and addresses of both parties, thus enabling the court to mail out a little pamphlet, 'A Personal Message to Parents,' to each party which points out the problems of divorce and facts concerning the Conciliation Court.

Utilization of this pamphlet has resulted in a 25 per cent increase in filings in the Conciliation Court.

12. A unique feature of the Los Angeles Conciliation Court is the utilization of a written Husband-Wife Agreement, which when signed by the reconciled parties, the Counselor, and the Judge, becomes a formal court order, punishable by contempt.

The concept of reducing marital relationships to a written agreement may seem to some marriage counselors unwise and productive of little good, yet the Los Angeles Conciliation Court has compiled over the years an impressive statistical record demonstrating that their Husband-Wife Agreement is an effective tool in insuring the permanence of a reconciliation. When couples are contacted one year after their reconciliation, it is reported that they invariably volunteer that they have read and re-read their reconciliation agreement and emphasize its importance in strengthening their marital ties.

This reconciliation agreement consists of approximately 25 pages, which cover practically every facet of married life and common marital problems. There are also eight special form agreements covering problems not encountered in the ordinary case, such as: third parties in the home, stepchildren, agreement to utilize the services of Alcoholic Anonymous; or concerning a third party romantic interest. Only the paragraphs and pages of the agreement which pertain to the problems of a given family are utilized in their reconciliation agreement. ..." (409)

Many of the above criteria are endorsed in the following observations of Meyer Elkin, Director of Family Counseling Services in the Conciliation Court of Los Angeles County:

"There now follows a description of the principal factors which we have found, from over a decade of interdisciplinary experience, insure the success of a marriage counseling service within the framework of the Courts.

The Crisis: A common denominator among the clientele of the Conciliation Court is a crisis situation. Many families have long festering problems that they have tried to deal with by themselves, but without success. In a preliminary study conducted in 1960 of 500 couples who applied for conciliation services, we found that in 71% of these families neither party had sought prior professional help.

The crisis plays an important part in terms of the results we achieve. People appear to be more susceptible to influence during a state of crisis. A crisis seems to have a positive effect on a person's motivation to take a look at himself and the marriage. It has been said that a little bit of counseling when a person is 'hurtin' real bad', is more effective than a lot of counseling when that person is 'not hurtin' so much'.

Availability: To take advantage of the crisis, the greater degree of motivation for change, and the increased possibility of helping the individual mobilize his capacity for change, the procedures to invoke the Court's service are simple, direct, and service is immediately available. The need to wait for counseling can be harmful to both partners and may result in the death of the marriage.

Our availability is expressed in many ways:

There is no charge or filing fee. We feel that in a Conciliation Court a fee is a barrier to service.

Each day, one or more counselors are available for the purpose of conducting brief preliminary conferences, following which most people file a Petition for Conciliation. If an individual is unable to appear in

person to make application, he can request the application papers by letter or telephone.

Our availability is also expressed in the unique nature of our eligibility requirements which do not have the traditional barriers for service; such as age, income, religion, degree of pathology and geography. Either partner in a legal marriage, with residence in Los Angeles County, may petition the Conciliation Court for help. It is not necessary that a divorce suit be pending. In about 40% of the families we serve, no legal action has been taken to terminate the marriage. We are finding that approximately 50% of our applications are filed by husbands, which is unique since other counseling agencies report that it is usually the wife who takes the initial step to obtain help for the marriage. It is not necessary that the family have children. About 12% of our petitions are filed by couples without children.

We will accept an application from any eligible family if one partner wants to save the marriage, whether or not the other partner in the marriage appears to be so motivated.

The clients of the Conciliation Court represent a cross section of the population of Los Angeles County in economic status, occupation, cultural background, race, religion, age, and length of marriage.

The Counseling Process: The Court provides only short-contact marital counseling service. It is crisis counseling. The focus is on a here-and-now reality basis. Ongoing marriage counseling, as we view it, is beyond the Court's scope and purpose.

The filing of the Petition for Conciliation is voluntary. This permits the Court to concentrate its efforts on those marriages which can possibly be restored through conciliation, so as not to waste valuable counseling time on those in which neither party is interested.

When the Court professionalized its staff, beginning in 1955, the limited amount of time with each family necessitated a break with tradition and the development of new approaches which appear to be effective within the framework of short-contact marital counseling.

Each conciliation conference covers a period of approximately $1\frac{1}{2}$ hours, in the course of which the parties are first seen together for a brief period to enable the counselor to define his role as an impartial one, to emphasize the confidentiality surrounding the conference, and the Court's function in relation to being of help to them. The parties are then seen separately. And finally, the conciliation conference ends in an extended three-way conference.

In the short space of approximately $1\frac{1}{2}$ to 6 hours per family, involving one, two and usually no more than three appointments for counseling, it is necessary for the counselor to engage in sharp diagnostic thinking and to provide intensive short-contact treatment.

About one-third of the couples have problems which require only short-contact counseling. The other two-thirds of the clientele have individual psychological and relationship problems that require ongoing help.

The Conciliation Court may be compared to an emergency receiving hospital for sick marriages, in that the counseling effort is largely focused on a here-and-now reality basis. We are able to provide some immediate relief for the pressures and pain. However, when the 'internal injuries' in the marriage are sufficiently severe, we will recommend a referral to another community agency where the treatment can continue. Referrals are made to Family Service, private non-profit counseling agencies on the Court's referral list and others. The Court also has a short-contact group counseling program. Each group, conducted by co-counselors, consists of five couples (married to each other), meeting once a week for six weeks, for $1\frac{1}{2}$ hour sessions.

In our counseling, we find that we are more directive than counselors who may be providing help for an extended period of time. We also use confrontation more than the average counselor.

We feel that marriage counseling is more than helping each person in the marriage, because a marriage is more than just the sum of two people. There is also a marriage relationship. The counselor's focus is on improving the relationship.

We believe that it is not always necessary for the client to know the causal reasons for his problems in order for him to help himself function more effectively. At the same time, we recognize and accept the point of view that in certain instances ongoing help is indicated because one or both partners are too emotionally ill to effectively function in either the marriage or in other areas of their lives.

People in a marriage crisis are not usually able to initially think in terms of a long-range counseling or psychotherapy program in order to save the marriage. We find that many families with marital problems are willing, however, to accept short-contact marriage counseling. Through such a service, the Court's clientele often becomes aware of the need for ongoing help.

The Constructive Use of Authority: One of the special characteristics of the Conciliation Court's service is its constructive use of authority. Our experience has shown that the use of authority can facilitate the process of short-contact marital counseling. By virtue of the Court setting, the conciliation counselor becomes a powerful authority figure in the eyes of the client, although the counselor is as non-authoritative as he would be in any setting, using a blend of permissiveness and authority as the situation requires. Clients often equate authority with strength, particularly those for whom authority has great meaning. The Court becomes the strong figure on which they can lean when the home situation is in a state of turmoil and crisis. Also, it may be easier for a male client to relate to a Court setting, which he may perceive as a more masculine type of setting.

The authority of the Court enables the counselor to surround a collapsing marriage with some external structure-- much like the splint on a broken arm, which permits healing to take place. Through such external controls and structure, the parties are helped to reduce immobilizing feelings which then permits the husband and wife and the counselor to engage in a search for the disruptive factors in the marriage relationship in an effort to determine whether new and workable solutions are possible.

An example of the use of authority is the original appointment letter, which is signed by the judge, and which contains this sentence, 'We trust you will keep this appointment voluntarily, and avoid the necessity of requiring the Court to issue a subpoena.' A citation, requiring the Respondent to appear at a stated time and place, is used only when there is evidence that such action may accomplish a constructive purpose for the welfare of the family, whether or not reconciliation appears possible. It is not used simply for the purpose of harassing, embarrassing, or punishing the Respondent, or without the full consent of the Petitioner. The California Law permits the party filing a Petition for Conciliation to name anyone having a bearing on the family controversy as a Respondent. A citation is sometimes issued to third parties, and when necessary, the judge can issue a Court Order restraining them from interfering in the marriage. However, I wish to emphasize that the citation is infrequently used. For example, in 1970, ten citations were issued in relation to 46000 families who petitioned the Court for help.

Another symbol of the Court's authority is the Marriage Agreement. When the marital partners, during the joint conference, decide that they want to attempt reconciliation, they utilize our Marriage Agreement. This Agreement is not compulsory, and it is rare for a couple to refuse to execute it when they are able to decide to attempt a reconciliation.

This Marriage Agreement consists of approximately twenty-five pages, which cover practically

every facet of married life and common marital problems. When signed by the judge, this Agreement becomes an Order of Court, and is enforceable by contempt proceedings if there is a flagrant violation, such as continuing to see a third party paramour, physical abuse, or dissipating family assets. However, the Court rarely exercises its contempt power.

We have found this Agreement, which represents a renegotiation of the marriage contract, is a valuable tool in the short-term counseling process. It fosters communication between the partners as they attempt to pinpoint the problems they are having and the actions each will take in order to correct the problems. It enables both the husband and wife to redefine their respective roles and responsibilities in the marriage. The Agreement becomes a blueprint for a successful marriage, tailored to meet the needs of each family.

Since the Agreement mentions most of the problems commonly encountered in marriage, the partners usually find relief in the discovery that others have problems similar to theirs. This discovery gives them emotional support and hope, since they no longer need to feel that they are 'different.'

Either party, at any time, has the right to ask the Court to terminate the Agreement, if the reconciliation fails. At the time the Agreement is originally worked out, all prior Orders made in the divorce case are suspended, with the exception of attorney fees. When the Agreement is terminated, these Orders are immediately reinstated by the Conciliation Court, and the divorce can proceed upon the basis of the original divorce filing.

At no time does the Court use its authority to coerce the parties into a reconciliation. The decision to reconcile is one that can only be made by the parties themselves.

We do not have as a goal the saving of all marriages. A Conciliation Court is more than a Reconciliation Court. We recognize that in certain instances, a divorce is the only answer. Our experience, however, does show that there are many families who come to a divorce court, who really have no business being there, and that with professional help the marriage could be restored. The Court is concerned about the unnecessary divorce.

We find that in many cases, the wife who has filed a divorce complaint does not necessarily want the marriage to end, that in reality she wishes that someone could provide her with some face-saving way of stopping the action she started. This, we are able to do in our Court by virtue of the many face-saving techniques which permit people under stress to accept help which is unfortunately regarded in our culture as a sign of weakness, rather than strength." (410)

Of the two alternative court structures above defined, that of the Family Court has been preferred in Canada. (411) As Daryl E. McLean has observed, however, certain common purposes underlie the two alternative structures:

"Whichever approach is implemented, counseling at the court as an adjunct to judicial procedure is said to be performed with four guiding purposes:

1. To secure and provide to bench and attorneys professionally screened information and opinion regarding the history and the current state of interpersonal relationships in the families of clients, especially the conditions and prospects for the children. [Some jurisdictions have made communications to a marriage counselor privileged.]

2. To provide, for those clients who want it, a limited amount of guidance and support, and in some cases re-educative psychotherapeutic counseling, throughout the period of pending litigation.

3. To soften and counteract the destructive impact of adversary procedure (assuming that divorce law reform is many years in the future), but not to supplant or modify legal processes.

4. To refer those clients who need and want more counseling to community family service agencies or mental hygiene clinics, or to pastors or private practitioners.'" (412)

And Professor Henry H. Foster, Jr. has concluded that the differences between the Family Courts and the Conciliation Courts do not appear to bear as great a correlation with success as the environment of the court and the competence of the personnel:

"An attempt has been made to summarize some of the American experience with conciliation and counseling in the court setting. The differences between the various systems and procedures do not appear to have as great a correlation with success as does the environment of the court and the competence of its personnel. There may be radical differences between a court in a vast metropolitan area such as Los Angeles or Chicago and one in a smaller, more stable and homogeneous community, such as Milwaukee or Toledo, where the court takes on many aspects of a social service agency. Furthermore, there may be difficulties in providing a uniform system where there are ten branch courts, as in Los Angeles. What the successful systems have in common, however, are able judges, competent professional staffs, and widespread acceptance by both lawyers and the community." (413)

It is now appropriate to examine studies on the concept of the unified Family Court that have been undertaken in Canada. The Quebec Working Paper on the Family Court recommended without qualification that conciliation services and clinical services should be established within the Family Court, (414) but the Working Paper did not articulate reasons or examine the alternatives whereby such services could be made available to but insulated or isolated from the Family Court. These alternatives were, however, considered in the Working Paper on Family Court prepared by the Institute of Law Research and Reform (Alberta). Thus Recommendations 16 and 17 read as follows:

"RECOMMENDATION # 16

THAT THE NEW LEGISLATION SHOULD EMBODY
THE PRINCIPLE OF SECTION 5(2) OF THE
PRESENT FAMILY COURT ACT WHICH READS
AS FOLLOWS:

A PROBATION OFFICER SHALL BE
UNDER THE DIRECTION OF THE
JUDGE OF THE FAMILY COURT AND
SHALL PERFORM SUCH DUTIES AS
ARE ASSIGNED TO HIM BY THE JUDGE.

RECOMMENDATION # 17

- (1) THAT THE COURT UPON APPLICATION OF
EITHER PARTY OR ON ITS OWN MOTION
BE EMPOWERED TO DIRECT THE PARTIES
TO APPEAR BEFORE A COURT COUNSELLOR
DESIGNATED BY THE COURT FOR CONCILIA-
TION OF MATTERS INCIDENTAL TO PROCEE-
DINGS FOR TERMINATION OF MARITAL STATUS
OR OTHER MARITAL RELIEF.
- (2) THE PARTIES SHOULD HAVE A RIGHT TO
COUNSEL IN SUCH CONCILIATION PROCEEDINGS."

The reasons underlying the above recommendations are set out in the Working Paper at pp. 78-80:

"3. Reconciliation

There is an undoubted social interest in causing husband and wife to be reconciled in a proper case. The provisions in the Divorce Act requiring that the matter be raised with a petitioning spouse, that the judge be satisfied that there is no likelihood of reconciliation and that the trial may be adjourned pending counselling, are expressions of social concern, and this concern is expressed elsewhere as well. Accordingly, there is a question whether the Family Court should provide counselling with a view to reconciliation of the parties.

Our view is that the court and the court counsellors should be alert to the possibility of reconciliation and make referrals to outside agencies if the possibility exists. We do not discount the possibility of some assistance in the direction of reconciliation, but we do not go on to recommend that the court engage in long-term marriage counselling. It appears to us that the long-term counselling facilities required for reconciliation are better located in social agencies elsewhere in the community. We say this against the background of things as they are and within the context of recommendations to be implemented within the near future in Alberta. We do not recommend against research and experimentation. We can see merit particularly in experimentation in short-term counselling with a view to the acquisition of experience in the field under Alberta conditions.

4. Conciliation

A function quite different from that of reconciliation is that of bringing about agreement on specific issues such as the amount of maintenance and the custody of the children. This may appropriately be termed 'conciliation'.

It seems to us that the court has a definite function in this field. The intake counsellor should, and we believe does, try to see that such

matters are settled by agreement rather than by going to the court itself. Similarly, if the judge can bring about an agreement, it is desirable that he do so, so long as he does not appear to be exerting the pressure of his office upon a litigant. The investigating counsellor in the course of his investigation may well see an opportunity for agreement which the adversary atmosphere may have prevented from showing itself. Again, so long as there is no coercion, it seems desirable that he promote any opportunities for agreement.

We believe that there is also room for a more formal procedure. This should be a pre-trial procedure designed to settle various issues between the parties, though not the central issue of reconciliation.

Our recommendation is that either party should be able to apply to the court for an order directing the parties to engage in the conciliation procedure. Our recommendation further is that the court of its own motion should be able to make such an order.

We believe that the court should be empowered to direct the parties to appear and engage in the conciliation process with counsellors on the court staff who might be either the intake workers or other court agency personnel. We believe that the parties should be entitled to have legal representation during these proceedings.

The primary object of such proceedings would be to facilitate the mutual negotiation and settlement of ancillary issues arising incidentally to proceedings for termination of the marital status or other marital relief. The role of lawyers would be to participate in the drafting of minutes of settlement. The role of the counsellor would be to enable the parties to come to terms with themselves by reason rather than by coercion of law. Even if the result is to cause the husband and wife to part without bitterness, or with less bitterness, the process will have been worthwhile." (415)

The Working Paper impliedly endorses the conclusion that if the philosophy and policies of the unified Family Court are to be consistent, it is essential that counselling and conciliation services be attached to the court and under the direction of the court. In other words, it is essential to the success of the unified Family Court that the court have a high degree of control over support services so as to provide for the direction and implementation of policies, procedures and legal requirements. Implicit in this conclusion is the opinion that autonomous social agencies cannot be part of the court structure and that such agencies are likely to be less responsive to the policies and needs of the court than support services established within the Family Court. The dangers of incorporating counselling and conciliation services in the Family Court are examined in the Working Paper in its analysis of the inter-relationship between counselling and conciliation services and investigative services.⁽⁴¹⁶⁾ Although such dangers cannot be ignored, the Institute of Law Research and Reform was clearly of the opinion that geographical segregation of the court and the counselling and conciliation services would tend to promote not only inconvenience to the public but also the lack of a cohesive policy and that such segregation would tend to undermine the efficacy of the court's attempt to resolve matrimonial and familial conflict by means other than judicial disposition. It may be that a solution lies in a compromise whereby counselling and conciliation services are housed in the same plant as the court with some degree of physical separation between the judicial and social arms of the court being maintained, e.g., by the utilization of separate floors or wings in the same building to

accommodate the respective facilities.

The question of control over support services, which is significant in the deliberations of the Institute of Law Research and Reform, has been the subject of extensive comment and there appears to be some measure of agreement that, if counselling and conciliation services are attached to the Family Court, a substantial degree of control over such services must vest in the court under the direction of the Chief Judge.⁽⁴¹⁷⁾ The collateral issue of administrative responsibility and control vesting in a designated Department of Government was examined in detail in the Submission of Chief Judge H.T.G. Andrews to the Ontario Government Committee on Productivity.⁽⁴¹⁸⁾ This writer endorses the recommendation of Chief Judge Andrews that a Family Court Services Division should be established in the Department of Justice to assume responsibility for the overall administration of justice in the Family Court and this Division should include a Counselling Services Branch and a Youth Homes Branch.⁽⁴¹⁹⁾ A significant reason for the writer's endorsement of this recommendation rather than the alternative recommendation whereby a Family Services Division would be established in the Department of Social and Family Services lies in the fact that the latter Department may have a vested interest in the outcome of a case.

In conclusion, it must be emphasized that the character of counselling and conciliation services in any Family Court must largely depend upon the facilities or agencies available in the community and the cooperation that might be expected from these resources. It is generally conceded that the court services should not engage in long-term counselling and that they must strive to complement rather than compete with other facilities

or agencies in the community. Thus, Professor Henry H. Foster, Jr., has observed:

"The type of service provided by the court may be dependent upon the co-operation it receives from local counseling agencies. The Los Angeles Conciliation Court works in close co-operation with these agencies and avoids competing with them in long term counseling. A long term counseling service in the court may become a threat to community agencies and practitioners whereas short term counseling may complement such services. Moreover, the larger the court's staff and the more extensive its services, the greater the chance for antagonism between court personnel *inter se* and with outside groups and interest such as the bar and the counseling professions. The cost of a large staff also carries with it vulnerability to budget cuts by economy-minded politicians and citizen groups who are often skeptical about the value of social services. Most American courts, with the notable exception of the Toledo Family Court, do not have long term counseling services. It has been estimated that two thirds of those requiring counseling need long term assistance. This means that where there are serious emotional or mental disturbances referrals will be made to clinics, agencies, and practitioners who may or may not be oriented towards helping the individual or saving the marriage. Unless the court's staff is expert at distinguishing those who need long range counseling from those who may be helped by a few sessions, there will be confusion of function and wasted effort." (420)

The importance of a good working relationship between the court and counselling facilities or agencies in the community has been consistently emphasized in the literature and in research studies on Family Courts. Reference has previously been made to the early study undertaken by the

United States Department of Labor.(421) The need to establish an effective referral system between the court and community facilities or agencies appears to be self-evident. Few would, therefore, disagree with the following conclusions expressed in the Report of The Governor's Commission on the Family, California, 1966:

"We believe, further, that the serious problems which divorce presents are problems for the whole community, and **that** the community must develop its means to meet them. We therefore recommend that the Court be empowered to utilize community agencies and personnel in the counseling process, and that it be **enabled** to employ psychiatric, psychological and other specialists to consult with its professional staff and to assist in the development of community resources." (422)

The value of establishing an effective referral system and developing a close relationship between the Family Court and community resources is also underlined in the following statements of the Canadian Correction Association and the Canadian Welfare Council:

"...The family court can also, by working in cooperation with community resources, make helpful referrals to benefit the client. These referrals may be to family agencies, to medical or psychiatric clinics, etc.

... It is essential that a close relationship exist between the family court and the social agencies in the community so that inter-referrals may be made promptly and efficiently. Often a case is known to a social agency before it comes to court and the information in the file of the social agency can be of great value to the court in helping the members of the family find a solution to their problem.

Difficulty is often encountered in defining the respective roles of the probation officer

in the family court and the worker in the family agency. In his initial work with a family, the probation officer assumes primarily the role of an intake worker and an interpreter. He must explain to the members of the family in what way court action will limit their freedom in working out their problems. Treatment starts at this point. An accurate interpretation of what court action will mean should help the family decide whether a settlement out of court (which may or may not include referral to a family agency) or in court will be more productive.

Both the probation officer in the court and the worker in the family agency must be able to offer a casework service; the difference arises from the dissimilar settings in which they work. In relation to any particular family, the question to be answered is whether treatment can best be offered in the authoritarian setting of the court, or of the freer atmosphere of the family agency. Where there is hope or rectifying the family situation and re-establishing the normal pattern of family life, the case should be referred to a family agency. When court action is necessary, the probation officer gives a casework service in the same sense that a worker in a family agency does, but with recognition of the difference in the setting.

A special problem arises in areas where there is no family agency or other agency offering a family casework service, to which cases can be referred. In some such areas the family court probation staff carries the work that would be done by a family agency in a larger centre." (423)

The Probation Officers Association of Ontario has expressed similar opinions in the following statements:

"It is further recommended that where other agencies in the community are providing a similar service, they should be offered the continuing co-operation of the court-centred service so that each can deal with the kinds of problems for which they are best suited. The services should not compete with each other but should be complementary. It is felt that a general policy should be developed defining the type of problem which each would attempt to deal with but that this should be flexible in its application. Human problems do not lend themselves to rigidly imposed solutions." (424)

There is indeed much to be said in favour of the submission of the Ontario Welfare Council to the Ontario Law Reform Commission that formal procedures should be developed for referral to family service agencies for on-going counselling and that government funds should be made available to such agencies to specifically facilitate the handling of such referrals.⁽⁴²⁵⁾

In addition to establishing or maintaining a good working relationship with outside agencies, it is submitted that the Family Court should assume a more substantial role in endeavouring to secure more adequate resources in the community to promote the constructive resolution of matrimonial and familial problems.⁽⁴²⁶⁾

3. Should counselling or conciliation be voluntary or mandatory? To whom should court counselling and conciliation services, if any, be available? What procedures should be used to institute counselling? Should court counselling and conciliation services be provided on a short-term or long-term basis?

In attempting to resolve the issue of whether counselling or conciliation should be voluntary or mandatory, useful insights may be gained by examining opinions on the experience in the Family Courts and Conciliation Courts in the United States.⁽⁴²⁷⁾ Commenting on this issue in the context of procedures adopted in the New York Family Court, Jon M.A. McLaughlin has stated:

" Once a legislature decides the purpose of the counseling service, it should confront the questions of whether and how coercion should be used. 'Coercion' is used in the broad sense to include forcing parties to engage in a conciliation procedure regardless of their personal wishes.

Counseling could be offered at state expense only if both spouses desired it. Counselors, either state employees or private individuals subsidized by the state, could be authorized to use persuasion but not force or the threat of force to compel an unwilling spouse to submit to one or more interviews.

Such an approach would bypass intangible benefits of which the New York experience provides some evidence. During mandatory initial conferences in New York, an undetermined number of spouses have been persuaded to attend further counseling sessions which have developed valuable insights into marital problems. The commissioners and their staffs report impressions that the observance by one party of the other's opposition to reconciliation in front of a neutral third party facilitates the breaking of emotional ties, and produces relief in a large number of initial conference cases. Other spouses have obtained relief from guilt feelings through a belief that they have participated in a last, tangible effort to save the marriage. According to conciliation officials, in numerous cases the conference has fostered reflection on whether divorce is really the desired goal. In letters to commissioners a few persons have expressed gratitude that the state was interested enough in their problems to require a conference. In other words, a

screening type interview may serve to convince divorcing couples that society and the state are concerned with their marriage and are interested in them on a human level.

Coercion may be used either to compel one or more interviews regardless of the desires of both spouses, or to require interviews only upon the request of at least one spouse for the use of the service. In the absence of legislative specification, conciliation officials in New York have employed coercion in both instances (if an affirmative answer to the conciliation question on the preliminary questionnaire can properly be regarded as a request for use of the service).

Mandatory interviews can be used for one or more of three purposes: to inform parties about the nature of the counseling services available to them; to explore their willingness to undertake therapy or counseling voluntarily thereafter; or to subject them to therapy regardless of their wishes. In resolving to use coercion the New York legislature left determination of the purposes of authorized coercion to the administrators. In the three bureaus studied the line in practice has apparently been drawn at no coerced counseling, which may possibly be unconstitutional, and, indeed, at no coercion in general beyond a possible mandatory screening interview to inform the parties involved of the service and to determine their willingness to attend further counseling sessions voluntarily.

But, workers conducting initial conferences in New York report that while in many cases it becomes evident within a few minutes that at least one party is wholly opposed to further counseling, in other cases parties do not begin to talk freely about their problems until 30 minutes or more of the interview have elapsed and apprehensions have partly subsided. Two or more required interviews might, therefore, be desirable in appropriate cases at the interviewers' discretion to determine actual interest in counseling and to inform spouses of the nature and extent of available services. A second interview might permit spouses to make a decision concerning

counseling in a more relaxed mood.

The purposes and possible number of required interviews should be legislatively or administratively delimited and announced to all participants in advance. However, spouses might be so notified on a mailed form, supplemented where necessary by repetition of the information at the start of the first interview. In addition to forestalling fears of compulsory counseling and reconciliation, such promulgation of limited goals would avert confusion by making clear to all participants the interview's purposes." (428)

At the conclusion of the above analysis, McLaughlin formulated the following propositions:

"One or two interviews by professional marriage counselors should be required, limited to a determination of the spouses' willingness to be counseled further on a voluntary basis and to inform them of the nature and extent of the counseling services available.

Coerced therapy appears unjustifiable, in part because it may be unconstitutional, and in part because there is doubt about whether such 'therapy' would produce more insight than resentment in the clients. But the potential benefits indicated by the New York experience and the slight harm that resulted justify a limited use of coercion.

The conciliation service should be available only upon the request of at least one spouse, regardless of whether a matrimonial action has begun.

The use of state coercion seems more acceptable when it has been requested by a spouse. Questionnaires would be unnecessary if this plan were adopted. In many cases counseling may be more effective if provided earlier in a marriage than at the commencement of its legal termination.

Notification of the above...provisions should be given to both spouses prior to initial interview. Counselors should be encouraged to avoid role confusion during interviews." (429)

The above characterization of the counselling and conciliation procedures in the New York Family Court may be contrasted, however, with that of Elizabeth and Richard Dyson, who have stated:

"For a conciliation service that is almost never formally invoked, New York outlines a detailed and ponderous conciliation scheme. A person invokes the court's help either by filing a petition stating that conciliation services are desired or by approaching the probation service informally prior to petition. In either case the probation service may confer with the party desiring help and may invite the person's spouse to attend. The court has power to order reluctant spouses to attend two conferences. Direct counseling may be offered by court staff, or referrals to outside agencies may be made. Unless both parties consent to longer-term counseling, conciliation proceedings automatically terminate 90 days after a petition has been filed.

Whether counseling can be successful where one party is forced to attend is subject to differing opinions among professional marriage counselors. One counselor has written,

'The real dilemma is whether or not casework can contribute or is willing to contribute through the process of counseling when the clients are requested by authority to seek such counseling.... "Unless a person really wants help, there is little chance that anything will happen," is a by-word familiar to caseworkers as well as psychotherapists.'

On the other hand, it has been suggested that

'if...[the parties] have no choice but to meet vis a vis in the presence of a sympathetic counselor who assures them that their statements have a privilege comparable to that of the confessional, they may begin in heat with their recriminations and end in the light of understanding, or if not in such a complete metamorphosis, at least in the willingness to try again.'

In any case, however, the question whether New York's conciliation procedures are conducive to success is becoming academic, since the meager number of cases filed under the conciliation article of the Family Court Act dwindles each year. The Judicial Conference reported in 1966, 'Only 268 conciliation proceedings were disposed of in the judicial year 1965....the continuing decrease in the use of conciliation proceedings during the past few years...is disappointing.' Now that New York has adopted a new divorce law and has set up competing conciliation machinery in the supreme court, many observers see even less use for the family court's cumbersome conciliation article." (430)

Turning from the Family Court to the Conciliation Court in the United States, it is appropriate to examine the Conciliation Court of Los Angeles County, which pioneered conciliation counselling in a court setting. The procedures adopted in the Los Angeles Conciliation Court have been previously described in general terms. (431) An element of coercion exists in the conciliation procedures of this court at several points. Under the Family Law Act, California, 1969, in all proceedings for dissolution of marriage that are filed in a county having a Conciliation Court, the parties must file a confidential questionnaire. The County Clerk forwards to the Conciliation Court those questionnaires wherein a desire for reconciliation has been indicated and the parties are then invited by the Conciliation Court to file a Petition for Conciliation in that court. (432)

In the event that only one of the spouses wishes to utilize the procedures of the Conciliation Court, the other spouse may be required to attend a conciliation conference and non-compliance with such requirement is punishable by proceedings for contempt. Thus, Judge Lester E. Olson has observed:

"If a respondent refuses to attend the appointed conciliation conference, the counselor, after evaluating the situation, recommends to the judge whether a subpoena should be issued or to terminate further proceedings. In many cases it is feasible and practical to insist that the reluctant respondent appear. We have also found, from experience, that such procedure is psychologically sound. Many times a party's pride may make him reluctant to cooperate, or his in-laws may be urging him not to attend, and the Court's insistence is a means of helping him 'save face,' for often he is secretly anxious to explore the possibilities of reconciliation. Even though no reconciliation is effected, these friendly and helpful conferences result in beneficial by-products to both parties and particularly their children. Tensions are eased, hostilities reduced, common grounds of understanding created enabling the parties to amicably adjust their differences, such as harmonious visitation arrangements. Many times it promotes the settlement of controversial property rights and the elimination of a bitterly contested dissolution of marriage case.

...The Court's contempt power in conciliation cases is more in the nature of a psychological tool rather than a force to be actually used. It is not necessarily the exercise of the power that is important as the knowledge that the court has such power to use, if necessary." (433)

Although impressive statistics have been released by the Los Angeles Conciliation Court seeking to prove the efficacy of the conciliation procedures therein adopted, independent evaluation of such procedures is lacking. The writer is personally aware of the fact that the accuracy of the official statistics has been seriously questioned and, accordingly, reliance cannot be placed upon such statistics in the absence of any independent appraisal. An opportunity to evaluate the effectiveness of similar procedures in Canada will soon be available; however, by reason of a pilot project currently being undertaken in the Edmonton Family Court. Pending such evaluation and the accumulation of data on the efficacy of mandatory procedures, this writer concludes that mandatory counselling of any type ought not to be introduced in any unified Family Court established in Canada in so far as the jurisdiction of the court is directed to the resolution and disposition of inter-spousal conflicts. Such a policy should not, however, preclude an invitation being extended to the spouses to have recourse to counselling and conciliation services in the court or in the community.⁽⁴³⁴⁾ The availability of resources in the court or the community should, moreover, be communicated to prospective litigants when inter-spousal proceedings are contemplated or instituted.

Linked to but not coterminous with the issue of the extent to which coercive procedures should be invoked is the question of selectivity of the parties who shall be granted or denied access to the counselling or conciliation process. Here again, reference may be made to opinions reflecting the various procedures adopted in the United States. Commenting on the Family Courts of Rhode Island and Hawaii, Elizabeth and Richard

Dyson have observed:

"In Rhode Island, the family counseling unit had only been in operation for a month at the time of this writing, so we can only sketch projected plans and some of the counselors' ideas on their approach to marriage counseling.

The chief judge had instructed counselors not to accept any cases unless a divorce petition had already been filed. Of these cases, only voluntary self-referrals were to be accepted by the service. As to accepted cases, the counselors seemed to feel that they should limit themselves to giving 'short-term' therapy at first—one, two or three sessions at most. Style or technique should be flexible, they felt, varying with clients' personalities. Couples who had already worked over some of their problems might be interviewed jointly; less self-analytical couples would probably be seen separately. Whether post-divorce counseling problems should be handled by the service had not been considered. ...

In marked contrast to the cautiousness of Rhode Island's family counseling service in accepting only a limited class of clients (those that have filed for divorce), the First Circuit Family Court in Hawaii offers 'walk-in' marriage counseling and free advice by telephone to any member of the general public. The experience of some 'conciliation courts' has been that unless cases are limited to those where a petition has been filed, staff skills become stretched too thin and not enough time can be devoted to each case. But apparently this has not happened in Hawaii; the service has never been flooded with requests. The administrator of the service feels it is unlikely to become inundated with applicants, since 'middle class people who can afford to go elsewhere are not likely to seek advice at the family court.' In any case, only short-term therapy is offered. The counselors do not get bogged down in cases that drag on for months, since they try to wind up all new cases within 90 days.

Less counseling is done in the first circuit

in potential divorce cases than in the area of intra-family criminal complaints. In January 1968, for example, the counselors were utilized in 28 criminal complaint cases, but only seven cases involved marriage counseling for parties to an action for divorce." (435)

And, addressing their attention to the Family Law Act, California, 1969 and to the question whether court counselling services should be restricted to spouses who have instituted legal proceedings, Judge William E. MacFaden and Meyer Elkin of the Los Angeles Conciliation Court have stated:

"The Act does not make provision for the use of the Family Court's counseling service by families who are on the verge of legally ending the marriage, but have not yet taken any legal action to do so. This is a large group who should have access to the court, since it is usually easier to help these families than the ones who have already taken legal action to terminate the marriage. In Conciliation Courts throughout the country, about forty percent of the Petitions for conciliation are filed by families who are not in litigation.

It is important for attorneys to have access to the court for such families, since many attorneys refer couples before litigation is started. In the New Jersey experiment which failed, attorneys were very unhappy about the fact that in order to help families avail themselves of the court's counseling program, the attorney first had to file an action to end the marriage. The law in New Jersey made no provision for counseling with families not in litigation." (436)

Jon M.A. McLaughlin identified the issues respecting selectivity in the following observations:

"Once the purposes and range of desirable coercion have been decided, the question of screening some couples out of the conciliation process may arise. If conferences are to be held, no conceptual reason appears to justify exclusion of any married couple; at least when either the existence of a legal action for dissolution of marriage, or the request by one spouse for counseling without such legal action, signals problems that can be considered potentially conciliable in the absence of more information. Indeed the question of screening, again avoided by the New York legislature, seems to depend upon the amount of money legislatively deemed available. The appropriate question to ask is: if resources are limited, what selection of couples should be made to have a meaningful program?

If there must be screening, the state might require at least one spouse to show an interest in counseling by making a request for it on a preliminary form. The form could be mailed to couples upon commencement of an action to dissolve the marriage. Persons might obtain such forms at public buildings or elsewhere.

If one party indicates that he or she deems consultation worthwhile, fails to understand available services, expresses doubt about future arrangements, or possesses hope of reconciliation, there is probably sufficient justification for holding a screening conference. The commissioners' and counselors' initial conferences in the three bureaus studied create the impression that the great majority of persons who answer affirmatively the question 'Do you desire conciliation?' on the Questionnaire form do so because of concern for the other spouse.

Unfortunately some couples would thereby be excluded from the process, who would have been included had a personal consultation been provided. Hopefully, the service's growing reputation in the community would produce an increased number of requests for its use.

If limited resources require further restrictions of the number of eligible couples, the state could begin to exclude couples in such categories as those who have been separated for a number of years, those without children, or those with grown children.

Whether the goal be conciliation or reconciliation, initiation of legal action for dissolution of the marriage should not be a prerequisite to consultation. Case and commentary, including the New York experience, abundantly demonstrate that relatively few couples can be induced to accept marriage counseling after legal action has begun. ...

The use of questionnaires to screen couples appears to be of limited value." (437)

This writer endorses the opinion that counselling and conciliation should not be confined to circumstances where proceedings for divorce have been instituted. The writer is also of the opinion that the type of selection or screening process to be adopted will be governed in large part by external factors such as the types of facilities available in the court and the community and the availability of money and personnel to implement counselling and conciliation procedures. If Family Courts of comprehensive jurisdiction are established in Canada, it is submitted that the counselling and conciliation services should concentrate upon providing assistance for those persons who have recourse to the court either informally or by instituting proceedings therein. (438) As stated previously, the writer is of the opinion that the Family Court

should not seek to become a community counselling clinic in which judicial procedures are peripheral to counselling and conciliation procedures.

With respect to the procedures to be followed in order to secure court counselling and conciliation services, there appears to be a consensus that such procedures must be simple and that complex procedures discourage the necessary cooperation of the legal profession. Thus, the Report of the Subcommittee on the Conciliation Court, Family Law Section, American Bar Association, has stated:

"Wherever conciliation procedures are characterized by elaborate legal procedural requirements, calling for attorneys to file a special form of complaint, service of summons on the respondent, filing fees, etc., the cooperation of a large segment of the bar is lost. The success of a court of conciliation is greatly accelerated and strengthened by attorney interest and cooperation. The New Jersey experience was most valuable in pointing up the need to secure these services for the people without first requiring the filing of formal complaints for dissolution of the marriage or for separate maintenance. ...

The procedure to invoke the court's services should be simple and direct.

In Los Angeles County couples can obtain a preliminary conference with a Senior Marriage Counselor without even filing a petition. In other words, a divorce-bound couple can literally walk into the court 'off the street,' so to speak. This often leads to the filing of a petition.

Provisions should be provided for a petition to be filed prior to or after a divorce action has been instituted. Even where parties are in court for a pendente lite

order, the Judge or Commissioner refer the couple for an exploratory conference with a counselor without the necessity of filing a petition.

All of these simplified procedures, making the court readily accessible, encourages utilization of its services, promotes understanding, and results eventually in reconciliations.

The pressing marital problem of most couples, like a ruptured appendix, needs immediate attention. Too often undue delay results in the death of the marriage through further estrangement and divorce.

As heretofore emphasized, complicated procedures, in other words involved red tape, is not appealing to lawyers, whereas simplified procedures meet with approval." (439)

The question whether court counselling and conciliation services should be available on a short-term or long-term basis has already been raised in the context of the inter-relationship of court and community services. The general opinion of those associated with court counselling and conciliation procedures favours the application of such procedures only on a short-term basis. The Conference of Conciliation Courts has endorsed this opinion in its proposals for a Model Conciliation Court Act. Thus, it has been stated:

"The intent of the law is that the court should provide a brief service; that the court should neither substitute for nor obviate other services within the community; but that the service of the court should not be subject to such restrictions that it cannot offer a flexible approach to the needs of the community in which the court operates. If there is not in the community a useful constellation of community-sponsored family service agencies, the court may

need to provide a continuing counseling service beyond its usual limitations while it seeks to motivate the community to develop and provide such agencies." (440)

The above declaration appears to correspond with existing practices and procedures in the Conciliation Courts of the United States and seems to reflect the opinion of both judges and counsellors in those courts. For example, Judge William E. MacFaden and Meyer Elkin of the Los Angeles Conciliation Court have observed:

"The [Family Law] Act does not specify whether the court's role is to provide only short-contact counseling or ongoing counseling. A court counseling function, whether it be a Conciliation Court or a Family Court should be short-contact. To do otherwise is to put the court in a position of competing with existing community counseling resources, thus negating the important role that these other counseling agencies can play in dealing with the increasing problem of marital failure.

One of the reasons the Los Angeles Conciliation Court has been able to maintain such a fine relationship with Family Service agencies and other counseling resources is that its relationship has not been a competitive one, but a complimentary one. A court's counseling staff should be carrying out the role of trouble shooter in crisis situations. Having helped the parties through the crisis, when ongoing counseling is indicated, then referrals should be made to other existing community resources.

The Conciliation Courts throughout the United States, combined in a Conciliation Court Movement, have proved for the past decade that short-contact counseling can be effective and the gains made are often permanent. There is now a substantial body of literature and theories supporting crisis intervention counseling as an effective counseling

approach and challenging traditional methods of counseling. When a court adheres to the principle of providing only short-contact counseling to deal with the 'here and now' crisis in family life, then it becomes the responsibility of all other qualified community counseling resources to expand their services in order to effectively absorb the increased number of referrals from the court when ongoing counseling is indicated. This is another aspect of the concept of a total community effort. A unilateral effort on the part of any one agency, such as a court, is certainly not as effective or realistic as a united effort of all agencies participating together to deal with the problem of family breakdown." (441)

4. What staff and facilities would be required? What is the prospective cost to the State? What benefits, if any, accrue to the State and to individuals having recourse to counselling and conciliation services?

The writer proposes to examine the qualifications and training of auxiliary staff in the Family Court in some detail later in this paper. Reference may, nevertheless, be made at this point to the following guidelines of Jon M.A. McLaughlin respecting counselling and conciliation in the Family Court:

"E. Selection of Personnel

1. Lawyers or Marriage Counselors?

Whichever goals of the service, amount of coercion and techniques of screening are adopted, the question of who should conduct initial interviews remains crucial.

Initial interviews to determine willingness and capacity for counseling, ideally demand sympathy and compassion to enable insight into another's motivations and modes of interaction. Interviewer mistakes, including oversights or indifference, can result in needlessly continued or provoked alienation from the thought of accepting counseling at the close of the interview.

Allowing lawyer-commissioners to perform this work seems questionable. The state could either provide its own counselors or subsidize private agencies and individuals engaged in marriage counseling. Relating to a person the impressions gathered concerning his need for counseling seems difficult although some lawyers and doubtless some barbers could perform it well. By allowing lawyer-commissioners to conduct the initial interviews New York may deprive spouses of whatever therapeutic value such impressions communicated by skilled clinicians might have.

Determining whether spouses desire counseling also should be the job of the persons selected to perform the further counseling because any emotional rapport built up during the exploration period could be used to advantage later. In some instances, the fear and distrust of psychotherapy engrained in popular opinion might be dispelled by dealings with a marriage counselor. One commissioner interviewed reported that such fear and distrust intensified resistance to the idea of counseling in many cases, regardless of social stratification.

The commissioners' legal training presumably helps to justify their annual salaries. But lawyer-like skills seem useful to the conciliation process primarily, if not exclusively, in those cases where the initial conferences become quasi-judicial proceedings for solving disputes involving custody, alimony and property. Such a function, essentially a pre-trial conference, appears appropriate after a conciliation process has ended. To perform this service at the beginning of the process appears to subvert the marriage counseling function by allocating time and resources which might have been devoted to counseling, explorations preliminary to counseling, or other couples.

The legislature, by failing to define clearly the role of commissioners, appears ultimately responsible, since this practice is neither authorized nor forbidden by the statute.

2. Credentials

Regardless of who conducts the interviews and counseling sessions, the task of conciliating couples seems complex and difficult, at best. The marriage counseling professions are in general agreement that some sort of training in psychology or related fields is desirable for such work.

If only to build public confidence in the service and to safeguard citizens against incompetence, the administrators or legislators might promulgate minimum requisites of training in psychology or social work for interviewers and counselors to whom cases are referred.

Legislative provisions might be proposed for training of counselors and lawyer-commissioners by psychiatrists or marriage counselors working full-time or part-time. Precedent for such in-service training exists in public and private marriage counseling services. ...

3. Interviewing the Interviewers

Marriage counseling is a field where value judgments abound. Middle-class therapists have displayed prejudice toward lower-income groups. Many therapists allow personal convictions concerning divorce to influence their professional work. There is a controversy about the value of 'directive' therapy, which can involve anxiety-producing persuasion. Drugs, hypnosis or group therapy may be prescribed by counselors or therapists, although others might disapprove of using such techniques. Fraudulent counselors pervade the field.

Such considerations suggest the desirability of a legislative or administrative determination of the goals of the counseling. If conciliation is a more congenial goal than reconciliation, the conciliators should not communicate value judgments, verbally or non-verbally, as to whether spouses should stay together; if the proper goal is reconciliation, more highly directive methods of persuasion might be in order.

The administration's selection of personnel for staff and referral lists should be based on more than mere credentials. The desirability of careful selection of personnel seems greater upon reflection that traditional, insight-oriented therapy of a highly verbal type may not attract, or be compatible with, some persons, particularly the most poverty-afflicted and least educated.

If state coercion is confined to requiring one or two exploratory interviews and couples thereafter are free to drop the counseling process, personal predilections and professional philosophies of counselors should be of less concern to the state. Even if no coercion is authorized, the state may prefer not to support by referrals or reimbursement persons using methods viewed by the administrators of the counseling service as of doubtful value.

In selecting desirable personnel, administrators might formulate questions similar to the following: What techniques are prescribed for encouraging persons to become clients? What counseling techniques are employed after a person has agreed to become a client? What considerations will lead to referrals elsewhere? What considerations will lead to termination of treatment efforts?

The administrators could employ reputable experts in marriage counseling or psychiatry to ask potential counselors these questions in order to determine more fully their objectivity, skill and interest in inter-personal relations. The New York experience suggests that a less expert process of selection leads to undesirable results.

The state could enlist the aid of faculties of medical schools and social work schools to conduct interviews as a prelude to selection of personnel for staff or referral lists. Administrators of the counseling service would thereby benefit from the presumably impartial judgment of experts experienced in evaluating therapists. Such experts could furnish detailed statements about the competence, personal qualities and beliefs of all proposed counselors and commissioners.

4. *The Judiciary or a Board of Governors?*

The New York experience raises additional questions about the ability of appellate and trial court judges and their assistants to effectively administer a marriage counseling program by such methods as promulgation of standards and procedures for selecting desirable counselors. ...

Administration could be removed from the political process by creating a board of governors which could be appointed by the judiciary and include psychiatrists, marriage counselors, former judges and lawyers serving on a part-time basis." (442)

At the conclusion of the above analysis, McLaughlin formulated the following conclusions and proposals:

"A list of counselors approved by the administrators of the service could be provided to both spouses.

The proposed list could inform the spouses of the range and nature of the counseling resources available in the community and thereby save interviewing time. The list might include photographs of the counselors, qualifications and religious affiliations and brief statements of their techniques and philosophies of treatment. Such a procedure would promote the couple's dignity by allowing them to make a reasonable well-informed choice of a counselor. It would build public confidence in the service by outlining qualifications of personnel, and tend to elicit in those spouses who agree upon a counselor a sense of commitment to the particular counselor selected which might enhance the value of the initial and subsequent interviews. The list could include private practitioners and agencies to enable state use of the best talent. The state might provide its own counselor particularly in areas where private ones are few or non-existent. If the spouses cannot agree on a counselor within a specified time following formal request for the service, a hearing before a judge or lawyer-commissioner to select a counselor might be authorized.

The administrators of the service should not approve any counselor without proof of his or her formal training in psychology, social work or related fields. Any counselor having a deficiency in his background should be willing to undergo training on an in-service basis.

There should be a board of governors consisting of highly qualified and reputable psychiatrists, marriage counselors, matrimonial lawyers and former judges, the purpose of such a board would be to devise preliminary forms, promulgate standards for the election of counselors, approve counselors, and organize in-service training where and when necessary.

The administrators of the service should approve no counselor until a faculty member of a reputable medical or social work school submits a written report of at least one interview with him. Such a report could include confidential statements about the counselor's potential as a therapist.

The legislature should provide for future appraisal of the service by requiring the administrators to plan and execute a followup study.

At the conclusion of the required meetings with a counselor, the spouses and the counselor could be asked to note on a form what seemed to them to be the marital problems needing resolution. Two years later all couples, or a random sample of couples, could be asked the status of their problems. Such a study, however informal and necessarily limited in scope, would at least give a legislature a better indication of whether the service had helped a greater number of persons than New York's legislature now has." (443)

The type of staff and facilities to be provided in the Family Court must necessarily depend upon local conditions, the availability of qualified personnel and the amount of funds available to implement a counselling and conciliation service. (444) It is impossible to

generalize about the prospective cost to the state without prior determination of the type of staff and facilities to be provided. The writer suspects that the type of staff and facilities to be provided will ultimately be largely determined by the financial allocation rather than vice versa, particularly in view of the absence of empirical data establishing the relative efficacy of various procedures and facilities and the general doubts that have been cast on the effectiveness of counselling and conciliation services.⁽⁴⁴⁵⁾ A vital question remains for consideration, namely, whether counselling and conciliation services and other auxiliary services should be provided cost-free to persons having recourse to such services in the Family Court. D. Evavold has stated:

"North Dakota provides that there shall be no charge for any of the services under the family court. In California there is a similar provision. In New York there is no statutory provision covering costs in the reconciliation proceedings. In Ohio and Wisconsin the actions must be initiated in the same manner as any other civil action, which apparently means that the ordinary fees will be charged for the summons or petitions.

One problem of any service is to induce poor people to take advantage of it. When family court proceedings are offered without cost anyone can take advantage of them, but there remains the hurdle of informing the poor about the free service. People on welfare need as much or more help and counseling than people who are self-supporting. By providing a cost-free family court, a large step forward has been taken.

The cost of counsel, however, still remains as a barrier for the indigents who are in need of a divorce. Without a divorce, these families have no choice but to resort to the 'poor man's divorce' (desertion), or alternately, to stay

together as a family unit with a resulting expansion of the unit and a corresponding increase in the welfare payments needed to support the additional children. The legislature, therefore, should now explore the feasibility of providing court appointed counsel for these indigents. It should be noted, however, that the right to counsel in a civil case is in derogation of the common law and any statutes granting such a right will be strictly construed, and will not be mandatory unless specifically required in the statute. For example, in Texas a statute which granted the court the right to appoint counsel for indigents was held by the Texas Court of Appeals not to be mandatory. Without such legislation the only other alternatives to those stated above would be for the indigent family court litigant to act as his own counsel or seek representation through a legal aid society, assuming he can locate one which is available and willing to take the case." (446)

This writer proposes to defer his examination of legal services in the Family Court but concludes that it may be necessary to develop more sophisticated criteria respecting the costs of other auxiliary services to which the parties have voluntarily had recourse. In this context, it may be of interest to refer to the following proposals of the United States Department of Health, Education and Welfare:

"42. (a) The following expenses shall be a charge upon the funds of the [appropriate political subdivision] upon certification of the same by the court:

(1) the costs of medical and other examinations and treatment of a child ordered by the court;

(2) reasonable compensation for services and related expenses for counsel appointed by the court for the party;

(3) the expenses of service of summons, notices, subpoenas, traveling expenses of witnesses, and other like expenses incurred in the proceedings under this Act, and

(4) reasonable compensation for a guardian ad litem.

(b) If, after due notice to the parents or other persons legally obligated to care for and support the child, and after a hearing, the court finds that they are financially able to pay all or part of the costs and expenses stated in subsections (a)(1) and (a)(2) of this section, the court shall order them to pay the same and may prescribe the manner of payment. ..." (446)

Clinical Services

It should be recalled that the Quebec Working Paper on Family Court recommended that a clinical service be attached to the Family Court, consisting of physicians, psychologists, psychiatrists, and social workers, and that this service undertake clinical examinations and act as consultant to the intake service, the court, and to members of the youth service and probation service. (448) The Working Paper further recommended that in judicial districts where no clinical service is attached to the court, the existing community resources should provide the Family Court with necessary specialized professional assistance. (449) Similar opinions have been expressed by Justine Wise Polier, Judge of the New York State Family Court:

"The court's mental health services, long recognized as an indispensable aid to the judge and the probation staff in efforts to prevent improper hospitalization, secure medical treatment where needed, develop appropriate plans for the care of children, and strengthen families so that children could be returned home, have deteriorated over the past decade. A small corps of devoted workers has been expected to meet a growing volume of demands with only the most primitive and limited tools and facilities. The expansion of jurisdiction to include

older adolescents, family offenses, and filiation proceedings adds substantially to the number of persons whose serious problems require a greatly enlarged mental health service if the court is to deal with them in constructive fashion.

The mental health services should be reorganized, strengthened, and made an integral part of the court structure. A plan should be developed to relate them to one or more teaching institutions and provide for research in the treatment of the mental and emotional disturbances that permeate the court caseload." (450)

It appears to the writer that many of the same questions arise for determination in this context as in the context of counselling and conciliation services. The difficulties are compounded, however, by reason of the fact that the clinician may be required to discharge a dual role, namely, that of "treating the patient" and that of "diagnosing his or her condition" for the purpose of reporting to the court in an attempt to secure the most appropriate disposition. In general, the writer is of the opinion that clinical services as defined in the Quebec Working Paper should not be attached to the court, irrespective of whether the role of the clinician is one of treatment or one of investigation on behalf of the court. In the latter context, however, it is vital to ensure that the court has clinical facilities available on demand in appropriate cases, either through established clinics or by a system of purchase of services. (451)

Legal services (including law guardian)

To facilitate an examination of the legal services that should be available in a unified Family Court, the writer proposes to set out the proposals respecting legal services that were endorsed in the Working Paper on Family Court prepared by the Institute of Law Research and Reform, Alberta, and to examine these proposals seriatum. In Recommendation 18 of the Working Paper, it is proposed:

- "(1) That there should be available to the court a service for separate representation of children in cases where the court, upon its own motion or upon application, considers such representation necessary in the interests of the children.*
- (2) That this representation should be by a lawyer independent of the court but familiar with such matters, the instruction of a lawyer in a separate agency such as the office of the public trustee being a reasonably satisfactory arrangement.*
- (3) That there should be available to the lawyer so named investigative social work services and such other professional services as the lawyer may consider necessary, particularly such psychiatric or psychological or social services as the circumstances of the case may call for.*
- (4) That these services be provided without charge to the parties and that they be sufficiently adequately staffed to avoid delay.*
- (5) That the lawyer be named an amicus curiae and that he be entitled to attend all proceedings, examine all witnesses, and upon the direction of the court to follow up and bring back all matters subsequent to the court order if so directed by the court."*

The above proposals substantially reflect an endorsement and institutionalization of an informal procedure which has evolved in the Supreme Court of Alberta. This procedure and proposals for its extension are defined as follows in the Alberta Working Paper:

"[In] Family Court there is an investigation where there is a genuine dispute, the investigation being carried out by a court counsellor.

There is no similar service attached to the Supreme Court which also deals with matters of custody as ancillary to divorce and which can deal with custody in other proceedings as well. There is therefore no systematic attention to the interests of the children except by way of confirming agreements between the parties or by way of adjudicating upon cases put forth by the adversary husband and wife.

A procedure has been developed in the Supreme Court and used in cases where the bitter feelings of the parents have reached the point where they are not willing or able to give dispassionate consideration to the needs of the children. The procedure goes back to the order of Mr. Justice M.E. Manning in Woods v. Woods, 1966, No. 41784, and has been followed in some 85 cases, mostly in Edmonton. The procedure is most often adopted upon the initiative of the trial judge but apparently in some cases at least upon the agreement of counsel for the parties followed by a consent order. There being no published description of the procedure, we will describe it at some length.

The order appointing the amicus curiae is as follows:

- (1) It recites that it appears desirable and in the best interest of the children or the court, with the consent of counsel to request that an amicus curiae represent the infant and make an investigation and recommendation on the issues of custody and access.

- (2) It recites that it is desirable to adjourn these issues until the investigation and recommendation have been conducted and completed, and orders accordingly.
- (3) It appoints an amicus curiae 'for and on behalf of the infant children. ...' and provides that as such amicus curiae he 'may conduct such investigations and employ such persons for the purposes thereof, and seek such expert assistance and guidance as he may deem necessary and that upon completion of such investigation he shall make a recommendation to the court on the issue of custody of the children and access thereto and in making such recommendation may call and tender any evidence he deems necessary subject to right of cross-examination, the paramount consideration to be the best interests of the children.'

The amicus curiae is the lawyer. ...The great bulk of the appointments have been undertaken by Mr. Alexander Hogan, Deputy Public Trustee, in whose hands the procedure has developed to its present stage.

The amicus curiae enlists the help of a trained social worker or counsellor, whose function is to conduct the detailed factual investigation and prepare a report. The amicus curiae also obtains the help of a psychiatrist. The psychiatrist will make use of the counsellor's report. He will make such inquiries as he thinks fit from interested persons such as parents or the new spouse of the parent claiming custody. He will consider any available agency reports and any available examinations for discovery if litigation has been involved. He will occasionally attend the home, though that is more often the function of the counsellor. The function of the psychiatrist is to formulate recommendations.

The functions of the amicus curiae himself are the traditional lawyer's functions of providing structure,

retaining his expert advisers, gathering together and putting in an appropriate form for presentation the facts and opinions made available by these procedures. The amicus curiae leads the evidence of the others but does not consider himself free to cross-examine.

It is possible for the amicus curiae to be authorized to bring the matter back if the parent to whom custody is awarded does not properly look after the child. There are procedural difficulties in the way, as he is not technically a party and his right to make an application or to initiate proceedings is in doubt. However, the matter can probably be brought back on the motion of the judge or of the other party.

It is apparent that this procedure trenches to some extent upon the adversary system. The amicus curiae and his advisers are independent investigators who are given access to the parties and the people surrounding them in a way which is not customary in an ordinary lawsuit. They are able to interview the parties in a way which is not customary in an ordinary lawsuit. Many of the facts they establish are based upon hearsay evidence in one form or another. It must be remembered however that the paramount consideration is the welfare of the child and we are of opinion that, so long as the procedure is subject to the control of the court and so long as those making reports to the court are available for cross-examination, the procedure is decidedly beneficial.

The procedure has grown up informally and no specific financing has been arranged for it. Its success has been dependent upon the willingness of the persons named as amicus curiae to apply their talents to the development and administration of the procedure without any obligation to do so or compensation for doing so. It has been dependent upon the willingness of court counsellors of the Family Court to take their own time to make investigations, and of the Family Court itself to allow some use of its facilities. It has been dependent upon the exertions of two psychiatrists who serve for nominal compensation. There are very definite limitations upon the extent to which the procedure can be developed under the circumstances, and it may well be that these limits have already been reached as the people involved are not able to deal with the cases referred to them as expeditiously as they would like.

We are satisfied that this procedure has, where it has been available, satisfied an urgent and important need. We believe that a service of this kind should be available to our proposed Family Court without expense to the litigants in cases where the court, of its own motion or upon application, considers that representation is necessary in the interests of the children. We believe that the amicus curiae should be a lawyer and should have available to him whatever services are necessary. He should have the right to examine and cross-examine witnesses and he should have the right to bring cases back to the court if he has reason to believe that the child is not being properly looked after by the person to whom custody is awarded.

We believe the amicus curiae should be a lawyer and agency separate from the Family Court. His location in the office of the Public Trustee seems logical and reasonable if proper funding is provided to the Public Trustee, but he could be established in another agency if that should appear to be more practicable, so long as he is free to give independent attention to the interests of the children. It would seem to us that the assistance required by the amicus curiae from counsellors could best be afforded by the investigative services which we believe should be available to the Family Court, so long as an adequate provision is made for the additional burden involved." (452)

The proposals set out in Recommendation 18 of the Alberta Working Paper should be examined in the broad context of a child's right to legal representation. Before examining this issue, however, certain observations are relevant with respect to the role of the amicus curiae. It will be observed that his role in Alberta has been confined to marshalling information that will assist the court in the disposition of a contested issue of custody, wherein the welfare of the child is the paramount consideration. The amicus curiae is thus an officer of the court rather than an advocate for the child, although these distinctive roles may be somewhat blurred in the context of custody dispositions. Strong arguments can therefore

be adduced in favour of delegating the present function of the amicus curiae to qualified lawyers in the Legal Department of the Family Court. If investigative services are attached to the Family Court, it appears logical and expedient for the amicus curiae to be similarly attached to the court. The writer accordingly favours the opinion that a solicitor should be appointed to the Family Court and that his obligations should include the responsibility of acting as amicus curiae in appropriate cases.⁽⁴⁵³⁾ It is not envisaged that the use of the amicus curiae should be mandatory or universal: a discretion should vest in the court respecting the circumstances wherein the services of the amicus curiae, in the person of the Family Court solicitor, shall be called upon.⁽⁴⁵⁴⁾

It will be recalled that the existing practice in the Supreme Court of Alberta involves the preparation and presentation of a social history and a psychiatric report. Although a psychiatric evaluation and report may be appropriate in certain cases, there is no reason to assume that such an evaluation or report is necessary in every case. The writer accordingly concludes that the amicus curiae should be guaranteed access to all such investigative or diagnostic services as are deemed necessary in the circumstances of each particular case but does not envisage universal recourse to psychological or psychiatric evaluation.⁽⁴⁵⁵⁾

Examining the proposals set out in Recommendation 18 in the broad context of the right of children to legal representation, there appears to be a groundswell of opinion asserting that a right to counsel should be provided, if not guaranteed, for children whose rights and interests are directly or indirectly in issue in matrimonial, familial or juvenile

proceedings. The inadequate protection afforded to children in inter-spousal or inter-parental litigation arising on marriage breakdown is emphasized in the following comments of Mr. Justice Galligan:

"Does our present legal machinery adequately protect the interests of children when disputes arise between the mother and father? I regret to say that I think the answer must be in the negative. It is a problem that troubles me greatly.

It is my intention to mention two important areas in which it appears to me that the interests of children in family disputes are not being properly protected by the present legal machinery: Custody and maintenance. ...

It goes without saying that there are very many parents, fortunately a substantial majority, who, when their marriage becomes intolerable to them do their very best, sometimes to the detriment of their personal interests, to arrange their affairs in such a way that the break-up of the family unit results in a minimum of harm to their children. Unfortunately, the number of cases where one or both of the parents have acted differently is sufficiently substantial that I think that the courts are needed to protect the interest of the children. I am convinced that there are very many parents who put their own self-interest ahead of the best interests of their children in matrimonial disputes. I regret to say that I do not think our legal system is adequate to the task of protecting children's rights in such cases.

CUSTODY

The first area, in my view, in which our legal machinery is not equipped adequately to deal with the rights of children is in the determination of who shall have custody of children of a marriage. The adversary system has, over the years, proved a reasonably good method of determining the truth. It is generally a very inappropriate method of determining the well-being of children. There can be and indeed are cases where one parent or the other is an absolute brute and

ought not for the physical and mental well-being of the children have custody and indeed perhaps access to the children. These really, from a judicial point of view, are the easy cases and are the ones with which the adversary system can adequately deal. The vast majority of cases which come to trial, however, are ones where the parents both give the appearance of being honourable, responsible, competent and loving parents but between them they cannot agree on what is best for the welfare of the children. The reason, the adversary system does not work is that those who have the greatest interest in the outcome of the proceedings, namely the children, are not represented. They await the outcome of a battle between antagonists whose personal interests are adequately protected by counsel representing them.

It is frequent that the parties are completely incapable of being objective about anything much less the welfare of their children because of the emotional state in which most domestic disputes occur.

While trying a case within the last year, I heard a highly qualified social worker describe the conduct of a husband and wife at an interview in the presence of the children, which interview was arranged in the hope of amicably re-organizing a family following a marital breakdown in a way that would be in the best interests of the children. That social worker described in precise detail how each of the parents, even at that meeting, attempted to use the children as a lever against the other. The evidence in the case convinced me that the hatred of each spouse for the other was such that each would use the children to inflict hurt upon the other. These were not wild beasts of parents, they were mature adults who were highly regarded by their mutual friends and associates and who appeared to the neighbours to be good, loving and devoted parents. The harm that they must have inflicted upon their children is incalculable.

The children were too young to be able to form an opinion of what was best for them or if they had such an opinion to be able to give a reliable expression of it. In most cases, I find it of no value to

seek the opinion of the children, particularly if they are young. The pressure upon the children at the time of a trial and the fact that motives of youngsters can change from day to day cause me to be reluctant to place much value upon what they might say on a given occasion.

In circumstances such as I have mentioned (and regrettably it is not a rare situation) it is obvious that some method other than a trial under the adversary system must be devised to determine whether the children's interests will be served better by ordering them to be in the custody of the mother or of the father. The parties may be so filled with hate for one another that reliance cannot be placed upon their evidence as to what is best for the children. An issue of that sort must be removed from the atmosphere of combat which an adversary trial tends to create.

The assistance of the Official Guardian's report in such cases is indispensable. However, there are severe limitations upon the possibilities for complete and thorough investigation in difficult cases. The Official Guardian's report very often will alert a judge to very important factors in a case but it has serious limitations in the sort of case that I have mentioned. Unfortunately the Official Guardian does not have the resources to carry out the full, complete, in depth investigations that would really assist in the difficult cases.

Working within the adversary system, it is unreasonable to anticipate that counsel will be able to detach themselves from the interests of the clients who retain them, namely, the husband and wife to view objectively the welfare of the children. Indeed, it may very well be in breach of counsel's ethical duty to his client to advance what he may objectively think is in the best interests of the children if that is contrary to his own client's interest.

No one can deny that each parent has an important right to be considered in litigation involving custody, namely, his right to the custody of his child. However, it is my strong belief that the paramount right in custody cases is the right of the child. (The primary principle to be considered by the Court in determining the issue of custody, is, of course, the welfare of the children.) However, in the present adversary

system that right is not represented before the Court.

I envisage that it is necessary to alter fundamentally our concept of the judicial determination of the issue of custody. Some procedure must be developed where, instead of a trial, there is a judicial inquiry into the well-being of the particular infants and at which hearing the infants are represented. The parents obviously should be entitled to appear and be represented. The persons representing the children in such inquiry would have to be provided with adequate investigation facilities including sufficient trained personnel and facilities to render real assistance to the Court.

The Official Guardian would appear to be the logical person to play this role. In order to do so he would need substantial expansion of facilities and personnel. He would also need the funds to obtain professional psychiatric and psychological assistance including examination of and reports upon the parents and children. This concept immediately will raise the objection that it would be expensive and burdensome to the taxpayer. That may well be but it strikes me that the welfare of children in a society that is seeing more and more disruption of the family unit is something which an affluent society has to afford.

MAINTENANCE

Another major area of concern to me is frequent shirking or avoidance of parental responsibility. There are many cases where a father walks away from his obligation as a parent and where the mother is quite prepared for her own purposes to permit him to do so. Often a mother indicates that she will abandon any claim for maintenance of the children of the marriage in divorce proceedings.

This frequently occurs when the case has initially been defended and then matters of corollary relief are settled and the matter comes before the Court as an undefended divorce. It

does not require a great deal of sophistication in many cases to conclude that the parties have agreed that the husband will either abandon his defence or bring the divorce proceedings, when the circumstances are such that only he has grounds for divorce, in return for being freed from his obligation to maintain his children.

There can be some exceptional cases where the overall interests of the children might be best served by the Court sanctioning such an agreement. But in the vast majority of them, the parents have no right to bargain away a child's right to paternal support. The obligation of a father to render support, guidance and education is an obligation to the child and the wishes of the mother can rarely have any bearing upon the child's right to have that obligation enforced.

The right of the child to the support of his father is not based solely upon immediate financial need. That right is an incident of the parent-child relation and the fact that the mother may not be in immediate financial need of assistance does not take away the obligation of the father to his child. Very often it is suggested that the mother has another man who is prepared to stand *in loco parentis* to the child. I cannot see that as derogating from the child's right to be assisted and helped by his natural father. In other words, I don't think the father should be let off the hook.

There are some very practical considerations that tie the hands of the Court if it attempts to force a mother to enforce the right of the child to the support of its father. If, notwithstanding such an agreement, an award of maintenance is made it really rests upon the mother to enforce it. If she does not wish to enforce it the matter effectively is not pursued.

Some time ago, while experiencing a feeling of utter frustration at what appeared to me to be a very unjust situation in one of these cases I made a maintenance order directing the father to make periodic payments into Court to the credit of the infant upon notice to the Official Guardian. A report of the case in which I followed this procedure recently is *Hansford v. Hansford*, [1973]

1 O.R. 116.

That judgement said, in part,

' There is a child of the marriage...who has resided with her mother since the time the parties separated in November of 1970. From the time of the separation until the present time, the Petitioner, by agreement with his wife, has paid her \$100.00 monthly as maintenance for the child.

The evidence discloses...an agreement that upon a decree being issued the Petitioner will no longer be responsible for the maintenance of his child. There is not the slightest suggestion in the evidence that the Petitioner is not well able to pay for the maintenance of his child. The evidence indicates that the wife is working, earns sufficient money to support the child and in due course she proposes to marry her co-Respondent who will then assume responsibility for the maintenance of this child.

I find it very disturbing that a husband and wife bargain away the rights of their child to paternal support...However, in a case such as this where the father has established an ability to pay substantial maintenance for the child and where there is no suggestion that he does not have the present ability to maintain his child, I can think of no reason why he should be freed from his high moral and legal responsibility to support a child whom he has caused to come into the world.

I conceive it my duty in cases where the rights of children are being seriously affected in divorce proceedings to ensure that the parties to the marriage protect the rights of their children. If the parties do not see fit to protect their children's rights then I feel obliged to attempt to do so.

In this case it appears that Mrs. Mansford does not wish to receive any of her husband's money for the maintenance of their child. In my view, [the child]

has a very clear right to have the financial support and assistance of her natural father. I cannot see how her mother's feelings can affect that right.

Whatever rights a husband and wife may have to terminate their marriage, in my opinion, they have obligations which transcend their own rights if they have children. I do not think that the right to divorce gives persons the right to abandon those high obligations of parenthood to love, guide, maintain, support and educate their children.

It is my opinion that any agreement between the parties cannot fetter the jurisdiction of the Court to make a maintenance order in favour of children who are not parties to the proceedings. (I am specifically restricting these remarks to an order under section 11(1) (a) (ii) of the Divorce Act.)

In my opinion, an agreement such as that entered into between Mr. and Mrs. Hansford is of no legal effect and does not absolve me from my duty to decide whether it is fit and just to make an order directing the Petitioner to pay maintenance for the child of this marriage.

According to section 11, I must decide whether it is fit and proper to make an order against the Petitioner having regard to the conduct, conditions, means and other circumstances of the parties to the marriage. In taking into account the conduct of the Petitioner I consider his attempt to bargain out of what I consider to be one of the highest obligations of parenthood to be conduct that I do not condone and certainly conduct that does not entitle him to be freed of his obligation to support his child.

The Ontario form of petition contains in paragraph 6 thereof a requirement that a petitioner set out the particulars of the past, present and proposed custody, care,

upbringing and education of the children of the marriage. The Petitioner said, in part, in his statement of such particulars in his petition:

"I propose that the child...obtain an education to the extent of her abilities."

I take note of the fact that not only does the Petitioner make no financial arrangement for the provision of that education, he seeks the Court's approval of an agreement which would absolve him from the obligation of providing for the education which he proposed. There is no evidence before me which would suggest that the condition, means and other circumstances of the Petitioner are such that he should not contribute to the maintenance of his daughter.

The payments which I propose to order shall be paid into Court to the credit of the child of the marriage upon notice to the Official Guardian. The funds as they accumulate will be available for the benefit of the child should they be required as time goes by. In the event that Mrs. Hansford is fortunate enough not to have to apply to Court for all or part of the funds before her daughter attains the age of eighteen years, they shall be paid out of Court to the child when she attains her majority.

Apart from the fact that I have been told by some knowledgeable lawyers in the field that such orders are of dubious legal validity (so far as I know the Court of Appeal has not dealt with any of them) I do have reservations about the status of the Official Guardian to enforce payment of the order in the event that the husband defaults. If this procedure has merit, as obviously I think it has, I think it possible by legislation to cloth the Official Guardian with legal status to enforce the order for maintenance." (456)

The need for independent legal representation of children in inter-spousal and inter-parental litigation is also emphasized by Professor John Bradway,

who has observed:

"As far as children are concerned there are historical reasons for their exclusion from litigation against their parents. Whether the reasons are anything more than historical is not too clear. One will scarcely contend that children are a species of property of their parents like a horse or dog. They have *de facto* interests in the form of family security which deserve public attention. In juvenile court circles this matter of welfare of the child is taken seriously. The court acts as *parens patriae* or in some similar nonadversary overall protective capacity. In divorce their economic interests are cared for second hand by support orders; and their custody is too often a matter for bitter parental conflict. But it is suggested that both in juvenile courts and in divorce proceedings children as a matter of public relations should have a legal right to be protected against the beneficent interest of the court. This moral might be raised to the position of a legal right. It is not always desirable to rely upon the court itself to be advocate and judge. If we allow the parents or one of them to represent the children, there is not infrequently a conflict of interests. In fact, unless one is careful the children may become pawns in the quasi-chess-game the parents wage for a strategic advantage, or supposed advantage, over each other." (457)

In certain jurisdictions in the United States, statutory provisions or rules of court have been introduced to protect the interests of children in divorce proceedings and inter-spousal custody proceedings. Commenting on procedures operating in Wisconsin and Michigan, Professor Henry H. Foster, Jr. has observed:

"An outstanding feature of the Wisconsin Family Code is its protection of children. The code imposes on the court a duty to take affirmative steps to determine and protect the interests of minor and dependent children in both divorce cases and custody matters. In divorce cases, whenever child custody is in dispute or whenever there 'is reason for grave concern as to the welfare of the children,' the court appoints an attorney to serve as guardian ad litem. Ordinarily, the case is recessed for three months to facilitate thorough investigation, and, upon resumption of the hearing, the investigator makes a full report to the court. In unusual situations, the court may place custody problems under the supervision of the Conciliation Department for six months or a year and require a report at the end of that period. Further protection for children is provided by Wisconsin's unique statute; a trial court may grant either an absolute divorce or a legal separation regardless of the prayer for relief, where the court finds it would be in the best interests of the children to do so. ...

In 1963, the Michigan General Court Rules eliminated the requirement that the plaintiff state his grounds for divorce in factual detail at the time suit is filed; thus, the complaint is sufficient if it employs the statutory language. The grounds for the suit must be indicated at the pre-trial conference but only if the court or defendant so requests. The rules also make the judge responsible for determining whether minor children under divorce judgements are properly cared for and are living under proper influences. Rule 727.2 provides for a continuing investigation by the 'Friend of the Court' in all cases where there is jurisdiction over 'children whose custody, control and support' has been determined by the court, and imposes the duty of visiting the home from time to time 'to determine whether or not they are being properly cared for, and are living under proper influences.' Thus, in addition to the task of investigating and reporting the basic undisputed facts respecting the parties to the divorce action and their children, the 'Friend of the Court' staff is responsible for a follow-up investigation and report" (458)

The Domestic Relations Tribunal in Washington has also sought to protect the interests of children by providing for the appointment of a guardian ad litem in proceedings for custody and support of minor children that arise independently of dissolution of marriage. Thus, Judge Frank H. Myers has observed:

"The court has also provided by rule for the appointment of a guardian *ad litem* in all domestic relations cases not seeking a divorce or annulment but involving the custody and support of minor children in order to have an impartial investigation of the matter and to receive a report in writing. This procedure has been inaugurated to insure the adequate protection of minor children whose custody and support must be determined by the Court." (459)

And in Hawaii, section 333-23.5 of the Family Court Act provides:

"Sec. 333-23.5.* Criteria and procedure in awarding custody. In actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court may, during the pendency of the action, at the final hearing or anytime during the minority of the child, make such order for the custody of such minor child as may seem necessary or proper. In awarding the custody, the court is to be guided by the following standards, considerations and procedures

(a) Custody should be awarded to either parent according to the best interests of the child.

(b) Custody may be awarded to persons other than the father or mother whenever such award serves the best interest of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody.

(c) If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, his wishes as to custody shall be considered and be given due weight by the court.

(d) Whenever good cause appears therefor, the court may require an investigation and report concerning the care, welfare and custody of any minor child of the parties. When so directed by the court, investigators or professional personnel attached to or assisting the court shall make investigations and reports which shall be made available to all interested parties and counsel before hearing, and such reports may be received in evidence if no objection is made and, if objection is made, may be received in evidence provided the person or persons responsible for such report are available for cross-examination as to any matter which has been investigated.

(e) The court may hear the testimony of any person or expert produced by any party or upon the court's own motion, whose skill, insight, knowledge or experience is such that his testimony is relevant to a just and reasonable determination of what is to the best physical, mental, moral and spiritual well-being of the child whose custody is at issue.

(f) Any custody award shall be subject to modification or change whenever the best interests of the child require or justify such modification or change, and wherever practicable, the same person who made the original order shall hear the motion or petition for modification of the prior award.

(g) Reasonable visitation rights shall be awarded to parents and to any person interested in the welfare of the child in the discretion of the court, unless it is shown that such rights of visitation are detrimental to the best interests of the child.

(h) The court may appoint a guardian ad litem to represent the interests of the child and may assess the reasonable fees and expenses of the guardian ad litem as costs of the action, payable in whole or in part by either or both parties as the circumstances may justify." (460)

Professor Herma H. Kay has suggested, however, that the appointment of an attorney to act as guardian ad litem for a child is less useful in those jurisdictions wherein counselling procedures are established and the substantive law is premised upon marriage breakdown rather than upon the fault or offence concept with its concomitant emphasis on the adversarial process. Thus, Professor Kay has stated:

"Apart from its emphasis on divorce counseling directed at achieving a lessening of hostility between the parties that might otherwise express itself in legalistic battles over the children, the Commission took three other steps toward modifying the present law and procedure of child custody. One innovation, that of permitting the court to appoint an attorney to act as guardian ad litem for a child if good cause appears to do so, was taken over from the Wisconsin practice. Although Judge Hansen has reported most favorably on the Wisconsin experience with guardians ad litem, my own view is that the introduction of a third attorney to represent the children will be less useful in the California family court than it has proven to be in Wisconsin. Use of the marriage breakdown theory and divorce counseling in California will hopefully have reduced the parties' hostility and bitterness so that they can see themselves as parents who must cooperate in planning the future of their children in a sensible way. Wisconsin, however, still operates under the full rigors of the fault theory and the adversary system: in this situation the children may well need the protection of an independent advocate." (461)

An examination of the child's right to counsel cannot be confined to the context of inter-spousal or inter-parental disputes. The right to counsel is equally, if not more, important in proceedings respecting child neglect or juvenile delinquency. Indeed, this writer is of the opinion that legal counsel should be available to any child whose status, liberty or welfare, financial or otherwise, is in issue or relevant to

the disposition of matrimonial, familial or juvenile proceedings.

The need for legal counsel in proceedings involving charges of juvenile delinquency has been amply demonstrated in Re Gault (462), wherein Fortas, J. stated:

"Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this Court. [*Gideon v. Wainwright*, 372 U.S. 335] A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defence and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him'. Just as in *Kent v. United States*, ...we indicated...that the assistance of counsel is essential for purposes of waiver proceedings, so we now hold that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.

During the last decade, court decisions, experts, and legislatures have demonstrated increasing recognition of this view. In at least one-third of the States, statutes now provide for the right of representation by retained counsel in juvenile delinquency proceedings, notice of the right, or assignment of counsel, or a combination of these. In other States, court rules have similar provisions." (463)

A widely acclaimed procedure for protecting the interests of children in neglect and delinquency proceedings was introduced in New York with the enactment of the Family Court Act, 1962.⁽⁴⁶⁴⁾ Under section 242 of this Act, a law guardian is defined as an attorney admitted to practice in the State of New York and designated to represent minors in neglect proceedings, persons in need of supervision proceedings, and in delinquency proceedings. Law guardians may be provided by a legal aid society, or from a panel of designated law guardians in each county, or the appropriate Appellate Division may enter into an agreement with any qualified attorneys to serve as law guardians for the Family Court in any county.⁽⁴⁶⁵⁾ Section 249 requires that the court inform respondents of their right to a law guardian in the aforementioned proceedings and, at the request of a minor or on the request of a parent or person legally responsible for the minor's care, the court must appoint a law guardian to represent the minor if independent legal representation is not available to the minor by reason of inability to pay counsel or other circumstance. The court may also make such appointments on its own motion. In a penetrating analysis of the role of the law guardian, Jacob L. Isaacs has stated:

"The Family Court Act does not attempt to define the role of the law guardian. It is apparent, however, that in using the designation 'law guardian' rather than 'counsel', or 'attorney' or 'lawyer' the Legislature intended to indicate that the unique characteristics of the Family Court required a new concept of proper legal representation. While

it is premature to attempt to delineate definitively the scope of this concept, I would suggest that it contemplates that the lawyer perform at least three separate functions, namely, that of advocate, guardian, and officer of the court.

The Lawyer as Advocate. The Family Court is a court and not a social agency. The order of disposition which may ultimately be issued affects the basic rights of some parent or child. What is denominated as 'rehabilitation' often means the loss of personal liberty, and 'treatment' may really mean commitment to an institution where treatment facilities are either wholly lacking or grievously inadequate. Accordingly, the lawyer in the Family Court, no less than in any other court, must stand as the ardent defender of his client's constitutional and legal rights. He should bring to this task the usual tools of the advocate—familiarity with the applicable law, the ability to make a thorough investigation and logical presentation of the pertinent facts and the faculty for forceful and persuasive exposition of his client's position. The suggestion found in some writings that 'zealous advocacy' is incompatible with the objectives of a Family Court is without merit unless zeal of advocacy is confused with purposeless obstructionism.

The fact that the Family Court is a court, however, should not obscure the fact that it is a court with social objectives and social techniques. Law guardians and other lawyers appearing in the court have the obligation to understand the purposes of the court and 'must be familiar with social techniques to give truly effective representation.' Conscientious counsel will have to exercise intelligent discrimination in the use of tactics learned in other courts since wholesale importation of techniques developed in the handling of criminal or civil cases before other tribunals may not only threaten the objectives of the court but will rarely serve the interest of the minor client.

The Lawyer as Guardian. The use of the term 'guardian' as part of the title assigned to legal counsel in the Family Court would seem to connote an intention on the part of the Legislature to expand

counsel's role beyond advocacy alone. The concept of 'guardianship' would seem to require that not only the legal rights but the general welfare of the minor be thrown on the scale in the weighing by counsel of his course of action. The role of the 'wise parent' has, in effect, been transferred from the court itself to the law guardian.

In performing the role of 'guardian,' however, the lawyer must be ever mindful of the fact that he is not a trained social worker and should not attempt to usurp the function of the probation department or other diagnostic services of the court. Neither is he required to forfeit common sense and to accept social evaluation of his client's needs without applying that degree of critical skepticism necessary to insure at the least that the analysis is predicated on complete and accurate facts.

The Lawyer as Officer of the Court. Proper implementation of the law guardian concept would give substance to the oft-repeated and rarely meaningful description of the lawyer as an 'officer of the court'. The Joint Legislative Committee envisaged the law guardians as performing this role by assisting the court, supplying the Governor and Legislature with an independent view of the practical effect of the new Act, and serving a 'seeding' function among the bar generally by informing their colleagues of the practices and needs of the court.

As an officer of the court a lawyer in the Family Court must assume the duty of interpreting the court and its objectives to both child and parent, of preventing misrepresentation and perjury in the presentation of facts, of disclosing to the court all facts in his possession which bear upon a proper disposition of the matter, subject only to the restrictions imposed by the confidentiality of the lawyer-client relationship, of working in close cooperation with the probation service of the court to reach a proper disposition and, where necessary, to help in getting a child or family to accept such disposition.

In large measure the picture of the court which will be retained by the child will be conditioned by his counsel's attitude toward the court. If

counsel condones the 'beat the rap' approach and substitutes deception for honest but firm concern for the protection of his client's rights, he will not only be doing the court and his profession a disservice, but he will be rendering an even greater disservice to his client." (466)

The dual role of the law guardian in New York as an advocate representing the child and as an officer of the court presents a potential conflict of interest. In an attempt to preserve the diverse roles of the law guardian and offset the potential conflict of interest, the Family Law Act (New York), 1962 provides for two separate types of hearing, the first being a fact-finding or adjudicatory hearing to determine whether the allegations of neglect or delinquency are established by a preponderance of evidence, the second being a dispositional hearing to determine whether the minor requires supervision, treatment or confinement. (467) The statutory provisions defining the duties of the law guardian have, nevertheless, been criticized as failing to adequately resolve the conflict of interest that may arise from the diverse roles of the law guardian. Thus, Professor Monrad G. Paulsen has observed:

"The law guardian system raises the question of the role which the attorney should assume. The text of the Act suggests that the first duty of the law guardian is to protect the minor for whom he has been appointed. For example, a law guardian is defined as an 'attorney...to represent minors.' In another place, the statute speaks of the child's 'right to be represented...by a law guardian.' Yet such textual provisions do not solve the difficult issues that are presented by the question, does a lawyer's task of representing a child in Family Court differ from a lawyer's task in representing a client before a criminal or civil court employing the familiar adversary system. The proper resolution of the issue will be a long-time concern of the Family Court judges, the law guardians and those legal aid

societies who enter into law guardian contracts.

The issue would have been intensified by a change in the law. Upon the approval of the administrative board of the judicial conference, the family court in a county might have appointed a lawyer to be the 'family court representative' who would represent the petitioner, 'when, in the opinion of the family court judge or judges such representation will serve the purposes of this Act.' He might also have been assigned to perform other services. In counties appointing family court representatives, the complete return to an adversary system of proceeding would have been all but inevitable." (468)

The dilemma facing the law guardian in New York is also recognized in the following observations of Justine Wise Polier, Judge of the New York State Family Court:

"Although the law guardian's role is still in the process of development, several problems have already emerged which require careful study. To what extent should the law guardian serve in the same role as private counsel? Since the child and parents cannot secure counsel, is he—unlike private counsel—denied the privilege of refusing to serve or withdrawing from a case? To what extent is it his duty to advise the child to remain silent and to do everything in his power to secure a dismissal even when he knows that the child has committed the act and is a danger to himself or to the community?...

The question of the responsibility of the law guardian requires clarification. Some law guardians advise children to take the stand and speak the truth. They regard the responsibility to do everything possible to avoid 'conviction and sentence' (or 'adjudication and disposition') as inappropriate in a juvenile court, holding that the ultimate interest of the child requires full disclosure of the evidence so that appropriate services or treatment will be provided. Others take the position that their loyalty and responsibility belong exclusively to the respondent

to whom they have been assigned. They make maximum use of the 'right to remain silent,' even when the parents would prefer to have the child speak and the child himself wants to. They see their role as counsel for the defense whose task is to secure a dismissal by every legal means, including the right to remain silent. Sometimes this position is defended on the ground that the facilities for treatment and rehabilitation available to the court are so inadequate that a finding of delinquency may lead to inappropriate detention or placement more likely to injure the child than help him.

Many intermediate positions are taken which seem to shift not only with the individual law guardian's philosophy, background, training, skill, and personality, but with the individual case and, indeed, with the judge before whom the case is to be heard.

Aside from the question of responsibility to his client, the law guardian finds it almost impossible to play a constructive role at the dispositional hearing at this time because the sheer volume of cases and his lack of knowledge of community and placement services reduce his function to one of urging probation or accepting whatever placement is recommended by the probation officer or ordered by the court. Even in the significant number of neglect cases where remands in temporary care are continued for many months, intervention to seek re-investigation or work with the families is generally beyond his capacity.

Another matter requiring further study is the extent to which the record of probation efforts to work with the family or secure appropriate placement, the psychiatric reports, and the probation recommendation should be shared with the law guardian prior to the dispositional hearing. If the law guardian's role is to be more than nominal at the dispositional hearing additional staff must be engaged, new procedures must be developed, and appropriate rules of court must be adopted." (469)

Subsequent to the above analysis, Judge Polier concluded:

"The provision for a law guardian to represent the child in the Juvenile Court has proven to be of great value in assuring full presentation of the evidence, interpreting the court's role to the child and his family, and securing a fair hearing at the initial stage of the proceedings. If it is to be equally valuable at the dispositional stage, the staff will have to be augmented by persons who can give consultative service to the law guardian in regard to community services and placement facilities.

The service provided by the law guardian should be strengthened and broadened to protect the child at the dispositional hearing."(470)

The system of law guardians established under the Family Court Act (New York), 1962 was examined by the Ontario Family Law Project, which concluded that a suitable adaptation of the New York scheme should be introduced in Ontario and that a Department of the Law Guardian should be included in the Family Court system. The Report stated:

"Department of the Law Guardian

The appearance of children in court raises problems of frequent occurrence and concern in a family court system. There is a wide variety of ways in which the problem can arise, for example: delinquency; children under Part II of the Child Welfare Act; custody of children; adoption of children; children as witnesses. Further, there are all ages of children involved, beginning with new-born children, in the case of adoption. Frequently, children may be too young to instruct a lawyer or to have any understanding of their legal rights, although the Legal Aid system of 'duty counsel' (such as exists in the Metropolitan Juvenile and Family Court) is a useful contribution to this problem.

The Family Law Project has examined the system of 'law guardians', established under the Family Court Act of New York State in 1962. A description of the functions of that law guardian system is contained in the Appendix to this chapter, and, as pointed out there, the New York legislation contemplates that the law guardian will perform three main functions:

- (a) as an advocate, he will defend the legal and constitutional rights of the child;
- (b) as a guardian, he will take into consideration the general welfare of the child as well as his legal rights; and
- (c) as an officer of the court, the law guardian will interpret the functions of the court and its objectives to both the child and the parents, and he will work closely with the court's ancillary services to reach a good disposition of the case where that is involved and to help promote in the child and its family an acceptance and understanding of the purposes of such a disposition.

The Family Law Project recommends that a suitable adaptation of the New York law guardian scheme be introduced in Ontario and that a Department of the Law Guardian should be included in the family court system. This department should be regarded in the first instance as experimental, and its operation should be kept under review.

In the role of advocate, the law guardian would be entitled to appear on behalf of any person under the age of [majority] involved in any proceedings, actual or pending, within the jurisdiction of the family court system, and he would be entitled as of right to obtain notice of any such proceedings and all relevant information, documents, reports, etc. He would have a right of audience at any sitting of a family court concerned with such a case. He would, in effect, fulfil all the usual functions of legal counsel for his infant client. A 'mature' infant would be entitled to have his own counsel in place of an officer of the Department of the Law Guardian.

The law guardian would not also represent adult parents of the infant, except where there is no conflict of interest between the infant and the parents, and where he has been invited to do so. The range of cases in which he would be entitled to appear would include all those mentioned above as being within the jurisdiction of the family court system.

In the role of guardian, the Department of the Law Guardian would absorb the functions of the Official Guardian. In this connection, the Law Guardian's Department would have available to it the ancillary services attached to the court, such as probation officers, social workers, and so on. The Law Guardian's Department would also have power to employ, on an ad hoc basis, outside social workers or other personnel to carry out special functions. The Law Guardian's Department would, inter alia, receive notice of all questions involving custody of a child, adoption of a child, or a child coming before the court under Part II of the Child Welfare Act, and would have the right to intervene or appear on the child's behalf in any of these matters or proceedings. The Law Guardian would receive notification of all cases under Part II of the Child Welfare Act in which an unmarried mother appears to be under twenty-one years of age or in which a putative father appears to be under twenty-one years of age." (471)

Difficulties may be envisaged with respect to the proposals of the Ontario Family Law Project particularly in light of their correlative proposal that a Legal Department be also established in the Family Court system and that this Department assume inter alia the responsibility for prosecuting charges in juvenile delinquency proceedings. The Report stated:

"In delinquency proceedings, it will be necessary for someone to represent the State to present evidence as to an act of delinquency, and so on. The Family Law Project considers it undesirable that this function should be carried out by police officers, social workers, etc.

It should be carried out by a member of the Legal Department of the family court system. Social workers, probation officers, police officers, representatives of welfare departments, and so on, should appear before the family court in the role of witnesses, including the making of reports and including the giving of opinions within their field of competence. Thus, for example, save in exceptional circumstances, one would expect that, in delinquency proceedings involving a young person, the case would be presented by a member of the Legal Department of the family court system, and the child would be defended by a member of the Department of the Law Guardian. If the parents also thought it necessary to be legally represented, they could employ their own lawyer, either privately or through legal aid. If the proceedings are under Part II of the Child Welfare Act and, say, there is an application for Crown Wardship, the proposal for Crown Wardship, together with the evidence and reports, would be presented to the court by a member of the Legal Department and the child would be represented by a member of the Department of the Law Guardian.

It has been laid down a great many times by the courts and in legislation, that the welfare of the child is the over-riding principle in proceedings involving a child. The existence of this principle produces a difference between a case in which a child's welfare or future is involved, as compared with ordinary civil litigation, **such as a contract** or tort case. In these latter types of case, we have a contest between the parties (for example, with reference to money damages, or a piece of property) and subject to the rules of procedure and evidence, the parties establish the terms of the contest, such as what the issues will be, what facts will be alleged, admitted or denied, and what evidence will be called. Where, however, the proceedings involve the paramount principle of the best interests of a child, the court must apply this principle, whatever issues or form of contest the adult parties may propose, and irrespective of any agreements between them as to the 'lines of battle', or the disposition of the child.

This view of the court's functions, in a case where the welfare of a child is involved, is not novel and has a long history, for example, in the practice of the Court of Chancery in England. It is felt that the proposed Department of the Law Guardian will be able to play an important role in helping the family court system to give greater practical reality to this approach. It is for this reason that it has been proposed above that the Department of the Law Guardian should have notice of all cases in the family court involving children, and a right of audience. It would seem desirable to provide also that the Legal Department should have notice of all cases in the family court involving children and should have a right of audience where the Department may think it appropriate to appear in the public interest, or for the assistance of the court in the presentation of reports and evidence, or where the judge may wish the Legal Department to appear. The Legal Department would not, of course, appear on behalf of the child, since this is the function of the Department of the Law Guardian." (472)

The above proposals when read in conjunction with the proposals respecting the establishment of a Department of the Law Guardian generate some confusion as to the respective roles of the Legal Department and of the Department of the Law Guardian. The Legal Department is envisaged as participating "in the presentation of reports" and yet the Law Guardian is to exercise a role extending beyond that of an advocate representing the child and "will work closely with the court's auxiliary services to reach a good disposition of the case". (473)

In light of the above analysis, it is appropriate for the writer to formulate his own tentative conclusions. It is submitted that, if requisite investigative services are attached to the Family Court, the role of prosecution and of presenting evidence and reports relating

to disposition in neglect and delinquency proceedings could and should be vested in officers of the Legal Department of the Family Court.⁽⁴⁷⁴⁾ Such a scheme does not, however, obviate or satisfy the need for independent counsel to represent the child, and it is submitted that the right to such independent counsel should be guaranteed from the inception of proceedings⁽⁴⁷⁵⁾ and that such counsel should have a right of access in a dispositional hearing to all reports or investigations prepared by the staff attached to or available to the Family Court. The writer further submits that the right to independent counsel should be guaranteed to the child in relevant inter-spousal or inter-parental proceedings unless the court is satisfied by evidence submitted at trial that arrangements for the custody, maintenance, welfare and protection of the child have been resolved by the spouses or parents and that such arrangements are the best that can be devised in the circumstances and accordingly render it unnecessary or futile for independent counsel to be appointed to represent the child. The writer also endorses the following suggestions of Elizabeth and Richard Dyson:

"We suggest four ways in which the representation of children might be made more thorough and effective. Perhaps the most important is to prescribe a means of arriving at compensation that will reward the lawyer for the amount of work actually done. Lawyers are too central to the achievement of equal justice to leave the quality of performance to the vagaries of charity and good will.

A second method is to institute some kind of system whereby a given group of lawyers do enough family court work that they become familiar with local practices and legal doctrines in the area. Lawyers who appear in family court infrequently are not as likely to be useful as those who understand the philosophy and procedures of the court and the workings of its staff...

A third method is to provide sufficient funds for attorneys to conduct independent investigations of the facts, where appropriate. Overworked probation staffs may not have time to delve deeply into all aspects of a case; in such situations the diligent attorney may unearth facts that can make a crucial difference to the ultimate adjudication or disposition.

A fourth method is to provide attorneys with a means of participating realistically at the dispositive phase of a hearing.

'Often...the court itself is not equipped nor does it have access to, sufficient facilities to provide adequate remedial programming.... An attorney alert to such a situation may render valuable service, both to his client and to the court, by directing attention to the fact of the inadequacy, and asking that his client not be subjected to the ill effect usually attendant. And furthermore, he may... propose a solution to the dilemma, by exercising his initiative and devising a suitable, though perhaps novel, program of his own making.'

If the attorney is to be more than a rubber stamp to the judge's dispositional decision, he should have access to his own psychiatric resources, funds should be provided for the employment of expert witnesses, and some consultation sources concerning community treatment facilities should be available to him." (476)

With respect to the right to counsel extending beyond children to all parties having recourse to the Family Court, Recommendation 20 of the Alberta Working Paper proposed:

- "(1) *That provision should be made for legal assistance to persons coming before the family court who cannot provide it for themselves.*
- (2) *That if possible such legal assistance should be provided by the legal aid Plan.*

- (3) *That if the legal aid plan is not able to supply all necessary legal representation and assistance lawyers should be specially provided for that purpose.*
- (4) *That if possible lawyers should be provided by an agency outside the family court.*
- (5) *That the paramount consideration is the provision of legal assistance and not the mechanism by which it is provided." (477)*

These proposals substantially coincide with Recommendations 31-35 of the Quebec Working Paper. (478)

The writer endorses the opinion that a right to counsel should be available to all litigants in a unified Family Court and that legal representation should be provided under legal aid schemes and not be a Department of Legal Services attached to the court. Experience might suggest, however, that the provision of adequate legal representation for the indigent through traditional legal aid schemes is unlikely by reason of the costs of implementing an effective programme. (479)

If this is true, a concerted effort must be made to devise new techniques and procedures that will guarantee to the indigent a right to counsel. (480)

Such techniques and procedures would not and should not preclude the litigant from appearing in person and affirmative steps should be taken to simplify and standardize the forms and procedures in a unified Family Court. (481)

With respect to the creation of a Department of Legal Services in the Family Court, there appears to be a growing body of opinion favouring the appointment of legal personnel and the establishment of such a Department in the Family Court. It has been suggested that the Department

of Legal Services in a Family Court should discharge a variety of functions, including the tendering of advice to the auxiliary intake, counselling or investigative staff attached to the court, the prosecution of criminal charges and charges of neglect or juvenile delinquency, the presentation of evidence and reports of investigative personnel, and the enforcement of orders in default.⁽⁴⁸²⁾

A strong advocate of the need to establish a Department of Legal Services in the Family Court is Judge H.A. Allard, who has observed:

"Family Courts have been hampered in their development due to the lack of clearly established legal departments. The public interest in other lower courts has been represented by prosecutors, but there has not been a parallel development in Family and Juvenile Courts. There is a public interest in the uniform and consistent enforcement of maintenance, in particular where the children are a public charge. The State has a position in alleged acts of delinquency and child neglect. All too often the public interest has been left to personnel who are untrained or do not have a special interest in the law. Prosecution is often the responsibility of persons who are in conflict with this role due to other duties, for example, family counselling. In many cases Crown counsel has appeared on a case-by-case basis, but the major Family Courts are in need of full-time legal personnel. Where counsel now appears, too often it is because of some particularly notorious case or at the request of a particular children's aid society or municipal government. The public interest is not properly served in such an arrangement and neither are the children and families who appear before the court. Legal aid should also, through the same reasoning, be available in all matters which come before the Juvenile and Family Courts." (483)

The view that legal personnel should be attached to the Family Court is also endorsed in the Alberta and Quebec Working Papers on the Family Court.⁽⁴⁸⁴⁾ And, in the Ontario Family Law Project, a more detailed proposal favouring the establishment of a Department of Legal Services and defining the functions of this Department is prominent.⁽⁴⁸⁵⁾

The writer has previously expressed the opinion that a Department of Legal Services could legitimately assume the responsibility of prosecution in criminal, neglect or delinquency proceedings, and also engage in the presentation of evidence adduced by investigative services attached to or available to the court. It is submitted, however, that such a Department should not actively represent a litigant who is prosecuting a claim for matrimonial or familial relief in the court.⁽⁴⁸⁶⁾ The dilemmas arising in this context have been identified by Judge Allard in the following observations:

"The role of legal personnel poses problems. What is the role of Court staff when one party has legal counsel and the other does not? If the Court has available to it the services of a full-time solicitor, does this solicitor try to act for one of the parties or for both? By expediency, does Court counsel act for the party who does not have counsel if the other has retained a lawyer? A further question arises when both parties have counsel and they wish to by-pass the social approach. If the Court is an integrated Juvenile and Family Court, a Court solicitor might perform duties which parallel those of a Crown prosecutor, presenting delinquency, child neglect inquiries, maintenance order enforcement cases, and prosecutions of adults under these or related statutes. The solicitor would, however, find it difficult to act in custody disputes and maintenance applications; and he would find it untenable if divorce was part of the jurisdiction. These cases are based on a conflict, on a contest, on the basis that one is a winner and another a loser, and it is difficult to perceive a

role for the court solicitor which would not in fact be seen as taking sides in the dispute. Should the Court solicitor have at his disposal information supplied by Court counsellors, and if he receives such information how may he use it? He is caught up in the same dilemma as the counsellor, but his role is even more confused as it is contrary to his general professional practices. It may be argued that the Court solicitor merely enables all the facts to be brought forward but this would then put him in conflict with counsel for the parties. How would he also know what facts are to be brought forward? Court counsel have been particularly suggested in custody cases to represent the interest of children. The Court may have in fact five 'contending' parties: counsel for each parent, counsel for the children, counsel for the Court and the Court family counsellors. The Court solicitor has a useful role even if not assigned a prosecutor role. He can act as a consultant to social agencies and court counsellors and as a communicator to lawyers and the community about the legal facets of the Juvenile and Family Courts. The provision of legal aid and a staff aware of the legal implications of their tasks will do much to enhance confidence and respect for specialized functions of the Juvenile and Family Courts." (487)

By way of summary, the writer concludes that it is vital that legal services be established in the Family Court to assist the auxiliary staff, to advise prospective litigants of legal aid facilities, to prosecute criminal or quasi-criminal charges, to act as an amicus curiae in legal proceedings, and to assist the judge in researching the law. With respect to this last function, serious consideration should be given to the feasibility of appointing law clerks to Judges of the Family Court. (488)

Investigative services

In an attempt to define the potential role of investigative services in matrimonial, familial and juvenile proceedings, it is appropriate to refer to the comments of Elizabeth and Richard Dyson respecting the various types of investigative services envisaged by the Standard Family Court Act and established by Family Court legislation in New York, Rhode Island and Hawaii. Elizabeth and Richard Dyson have observed:

"In Rhode Island, as we saw, complete social histories are collected prior to petition in juvenile cases, and they suffice as background information during the rest of a case unless the judge specially orders further study. In the other family courts, however, more revealing background studies are supposed to be conducted after a brief preliminary investigation determines that a petition should be filed.

Three kinds of study may take place: social studies of a general nature on the history, background, capacities and circumstances of litigants; medical and psychiatric examinations; and specific inquiries into matters relevant in cases of divorce.

(1) The general social study

The language of the different statutes varies, but the Standard Act sets forth the kind of information that is typically gathered in the general social investigation:

'The investigation shall cover the circumstances of the offense or complaint, the social history and present condition of the child or litigants and family, and plans for the child's immediate care, as related to the decree; in cases of support, it shall include such matters as earnings, financial obligations, and employment.'

Supposedly the social study gives a portrait in depth of the social and emotional framework within which a family problem has developed. But it should be noted that the modest background and training of most probation officers, coupled with heavy caseloads, may place practical limits on the sensitivity with which such investigations are conducted. It will be recalled that family court personnel in Rhode Island were dissatisfied with the routine studies turned in by most probation officers there. And reports of New York City officers have been impliedly criticized by one family court judge:

'A caseload of this size compels the probation officer to limit his investigation to the factual data secured by clearance with the Social Service Exchange, a form report from the school, and an interview with the child and generally one parent. To expect even a professionally trained officer to develop in depth, on the basis of so limited an investigation, a study of causes of the family problems, together with a plan of treatment, is unreasonable; to expect professionally untrained staff to do so is absurd.'

Despite limitations of staff, however, appellate courts in New York have insisted that probation investigations be conducted where complex human relationships or orders of commitment are involved, and have even gone so far as to require sending investigators out of state where necessary to check on circumstances and behavior of litigants. Moreover, probation material that is permitted to influence a judge in reaching a disposition cannot be out of date. Dispositional orders based on stale investigations, in one case two years old, have been reversed on that ground.

Timing for conducting social studies varies. In Hawaii and under the Standard Act, the court may call for a social study prior to the hearing on the issues, or may postpone the investigation until after the fact-finding hearing (it must postpone such investigation in cases where the allegations of the petition are denied). In practice in Hawaii's First Circuit Family Court, whether allegations are admitted or denied, the

intake worker's preliminary report is the only information gathered prior to most juvenile fact-finding hearings. More extensive social studies are postponed until the period between the fact-finding and dispositional hearings, usually 60 days apart, except in cases involving children who have repeatedly appeared before the court. In such cases the two hearings may be telescoped into one, since a fresh social study is already in the file.

New York's law mandates that the social study be conducted only after a fact-finding hearing in all adult and children's cases except those of support. Even in support cases social studies are not to be made available to the court until a determination of liability has been made.

These provisions complement New York's scheme of separating the judicial process into two parts, first a fact-finding hearing to determine if an act has been committed, then a dispositional hearing to determine the best disposition once the court has made a positive finding of fact. The purpose of barring social studies prior to the first hearing is, of course, to ensure that the judge considers only whether an act has been committed, not whether a person needs treatment, in making his findings of fact. This situation contrasts sharply with the practice in children's cases in Rhode Island, where the judge may see a child's complete probation investigation even before he decides whether a petition should be filed.

(2) *Mental and physical examinations*

Mental and physical examinations are authorized by all the family court acts, though not in every kind of case. Rhode Island's testing power is almost without limit: 'any party within...[the court's] jurisdiction' may be examined by the Corrections Department or the Bureau of Mental Hygiene at the court's request, and additionally children and adults within the purview of the juvenile code may be ordered examined 'by a licensed physician who is expert in physical diagnosis or in neuropsychiatry.' The meaning of 'party within the court's jurisdiction' is not entirely clear; whether a person must first be *adjudicated*

to be within the court's jurisdiction is left unanswered by the statute. Family court judges have in practice interpreted their powers broadly, and have ordered psychiatric testing in numerous children's cases without prior adjudications of delinquency, dependency or waywardness. But the court uses its powers of examination mostly in children's cases. Adults are almost never ordered to submit to the broad powers of testing that the court possesses.

In actuality there are few adequate resources for psychiatric testing in Rhode Island. The resource most trusted, the Division of Vocational Rehabilitation, is available only in cases of children over 14 with some physical handicap. The other main resource is the Department of Social Welfare, whose methods are not highly regarded.

Several aspects of Department of Welfare testing procedure are criticized by court personnel. In the first place, the Department sends children in need of testing to the state training school—a doubtful atmosphere in which to enlist a child's cooperation and trust. In the second place, only 'perfunctory' interviews of about one hour are conducted at the training school clinic, and it seems questionable whether comprehensive material can be gathered in so short a time. In the third place, there is very little explanation of the results, or communication of any kind, between clinic and court personnel. Only rarely do court staff members meet or talk with the persons conducting the examinations.

Powers of testing children under the Standard Act and Hawaii's Act are as broad as they are in Rhode Island: their acts sanction physical and mental examination in any children's case, as well as placement in a hospital or other suitable facility for such examination. But mental and physical examination of adults is confined to cases where 'ability to care for a child before the court is at issue,' and presumably the court has no concomitant power to commit an adult to an institution for the testing it has ordered.

Hawaii's Act contains a unique provision which seems on its face to delegate judicial functions to psychiatrists. The Act provides that 'No child under the age of twelve shall be adjudged to come within the provisions of ...[the section concerning

law violators] without the written recommendation of a psychiatrist....'. The senior judge of the First Circuit Family Court says, however, that the provision is not interpreted to require psychiatrists' participation in the deciding function for all cases of children under twelve; rather it was inserted in the Act as a means of protecting against attempts to incarcerate young children at the Hawaii Youth Correctional Facility. Basically the provision is used to keep young children from being institutionalized, in cases where it is sought by parents who cannot cope with them, 'since no psychiatrist would ever recommend that a child under twelve be sent to the reform school.'

The one psychiatrist who is available for consultation with probation officers in the First Circuit Family Court does not personally interview children. Instead he renders opinions and advice after reading through files in particularly troublesome cases. Personal interviews and evaluations are conducted only by the full-time psychologist assigned by the Division of Mental Health.

Actually the full-time psychologist performs a variety of functions for the court. He does direct diagnosis and testing of children when requested, mostly in cases where evidence of real mental retardation arises. He sometimes acts as traditional therapist in a one-to-one relation in cases of the few children who 'are introspective and sophisticated enough to benefit from this kind of regular talk.' He even assumes a probation officer role in an occasional case, where he sees a child who might benefit from interested supervision and whose own probation officer is too overworked to give him close attention. In general, however, the psychologist views his most important task as helping to answer broad questions ('What should be the court's attitude toward glue-sniffers?') and to develop broad remedial programs for delinquent children, *e.g.*, punishment-reward programs to encourage acceptable behavior, such as those establishing financial incentives on fulfillment of certain conditions. In his opinion, traditional psychological testing has little place in a family court, except in the limited class of cases where basic mental endowment may be crucial to the ultimate disposition. As he put it, 'I can read through

the file, read the probation officer's report, and tell what I think about a child without subjecting him to a whole battery of tests. Tests may be an aid in determining certain questions such as a child's ability to concentrate or his attitude toward an outside examiner. But where you have a decent probation report, you usually have adequate information already.' ...

Paradoxically New York, so careful to limit the family court's power in most instances, gives sweeping powers of physical and mental examination in both juvenile and adult cases:

'After the filing of a petition under this act over which the court appears to have jurisdiction, the court may cause any person within its jurisdiction and the parent or other person legally responsible for the care of any child within its jurisdiction to be examined by a physician, psychiatrist or psychologist appointed or designated for the purpose by the court when such an examination will serve the purposes of this act.'

It will be noted that 'any person' within the court's jurisdiction may be tested, as in Rhode Island, and that the same lack of clarity pertains as to whether jurisdiction must first be established at a hearing. Also, going well beyond the Standard Act and Hawaii, the Act specifically sanctions examination of the parents of a child before the court, even if the parent's ability to care for the child is not the legal issue presented to the court, and even if the parent himself is not otherwise within the court's jurisdiction.

Courts in New York having their own mental health services, such as the family court in New York City, can usually rely upon their own regular staff for the diagnostic services they need. Remand to city hospitals for testing is used only in the most extraordinary cases. But in the upstate counties, mental hospitals often have to be relied on when testing is needed by the court. The Family court Act allows the court to remand persons requiring examination,

'during or after a hearing,' to state or county hospitals or to private institutions designated by rule of court.

Here again the extent of family court power is startlingly broad. Upon recommendation by the director of an institution, the court may order institutionalization for observation and study for a period of 30 days. And, if the director of the institution believes it necessary, the subject of the examination may be required to undergo treatment during his stay:

'During the time such person is at such institution for examination, the director may administer or cause to be administered to such person such psychiatric, medical or other therapeutic treatment as in his discretion [sic] should be administered.'

None of the other family court acts bestows treatment powers remotely comparable to these. In Hawaii and under the Standard Act, treatment of children by physicians, psychiatrists or psychologists may be ordered, but only after a child 'has been adjudicated by the court,' that is, after the facts have been found to establish that an act or condition occurred and the court finds treatment to be necessary in the disposition of the case. In New York, *any* person remanded for testing may be subjected to compulsory therapy, without a prior adjudication of jurisdiction by the court, and without a direct judicial order therefor. And since the Family Court Act permits appeals as of right only from final orders of the court, there is no immediately obvious legal remedy available for persons committed and treated under this section of the Act. Whatever remedy might be invoked would have to be an extraordinary one. ...

(3) *Special investigations in divorce and custody cases*

New York's family court has no powers of investigation in matrimonial cases comparable to the powers of the Rhode Island and Hawaii family courts, since the court has no jurisdiction over separation, annulment or divorce.

Rhode Island and Hawaii both have special investigation powers in cases of divorce. Hawaii's Act requires a social investigation of home life and family background in contested custody cases; in uncontested cases, the judge may still order an investigation if he has cause to 'believe such action is necessary to assure adequate protection of the minor or of any other person involved in the case.'

One of the judges of the First Circuit Family Court in Hawaii has high praise for the custody investigations done by court social workers. Not only does the court receive a useful guide in reaching a decision, but the investigators are often able to smooth over a number of problems during the investigation process itself. For example, a social worker in exploring whether a father claiming custody can provide a suitable home may induce the father to withdraw his claim voluntarily, by reasoning with him that he cannot change diapers or that his mother is probably going to end up raising the child.

Honolulu lawyers apparently accept the recommendations of the probation officers in most custody investigations. One referee estimated that less than ten per cent of attorneys request the maker of the report to appear in court for cross-examination, as they are entitled to do by law.

In Rhode Island, though the family counseling service is supposed to 'investigate the circumstances as directed by the court' in domestic relations cases, the investigation function is performed in practice by the family relations aides. Under a recently established court policy, all parties filing for divorce are asked if they desire marriage counseling. If the response is positive, a family relations aide is sent out for further information.

In a personal call to the home, the aide appears with an outline form seeking certain information. Most of the questions are designed to yield biographical, historical and financial information. If marriage counseling is ultimately sought by the parties to the action, the aides' reports are used as guides by the marriage counselors. If a divorce is finally pursued instead, the financial information thus collected is taken into account by the court." (489)

The above analysis coupled with that included in the Working Paper on Family Court prepared by the Institute of Law Research and Reform (Alberta)⁽⁴⁹⁰⁾ raises the following questions respecting investigative services in matrimonial, familial and juvenile proceedings:

1. Are investigative services desirable and, if so, in what circumstances should an investigation be undertaken? Should investigation be mandatory and universal in all or any type of proceedings or should it lie in the discretion of the court?
2. To what extent should investigative reports be made available to affected parties or their counsel? Should an opportunity for cross-examination of the investigator and/or of his sources of information be available as of right?
3. To what extent should hearsay evidence be admissible by way of an investigative report?
4. Should an investigator have access to Family Court intake files or to the files of a counsellor who has attempted to reconcile the parties or conciliate their differences?

5. Should investigative services be attached to or separate from the court?

The writer proposes to examine the above questions seriatim.

1. Are investigative services desirable and, if so, in what circumstances should an investigation be undertaken. Should investigation be mandatory and universal in all or any type of proceedings or should it lie in the discretion of the court?

The literature and studies on unified Family Courts have consistently asserted the need for investigative services to assist the court in the disposition of matrimonial, familial and juvenile proceedings.⁽⁴⁹¹⁾ The utilization of the probation service to prepare pre-sentence reports in juvenile delinquency proceedings is already well established in the Canadian courts⁽⁴⁹²⁾ and the use of investigative reports in custody, adoption, wardship and neglect proceedings is also well-established in the Juvenile and Family Courts and the County or District Courts.

In examining the prospective role of the investigative services in matrimonial, familial and juvenile proceedings, it may be desirable to distinguish inter-spousal proceedings from proceedings primarily confined to matters affecting the children. In the former context, and more specifically in relation to divorce and nullity proceedings, it has been asserted that the investigative services should not be used to substantiate or vitiate allegations of either party respecting the grounds for relief, although such services could be relied upon to expose fraud or collusion. Thus, in an early report of the United States Department of Labour, it is stated:

" As far as judicial treatment is concerned divorce cases may be divided into two parts: The determination whether or not a divorce should be granted and the proceedings after this question has been settled, including alimony and custody of children. ... Divorces are to be granted only in certain well-defined cases and under certain conditions. The court, of course, should safeguard itself as much as possible from fraud and collusion, and in many jurisdictions reform is greatly needed. The social investigator in some jurisdictions has been called upon to make field investigations to determine whether fraud exists; but in general, until the existing rules of substantive law are changed, it would seem that the new technique can not and should not be applied to the question of severing marital relations unless the welfare of children is involved. What has been said with respect to divorce applies also to cases where annulment of marriage is sought. Here, too, the question is chiefly one of substantive law." (493)

It should be observed, however, that the above statements were made at a time when the grounds for divorce in the United States were substantially premised upon the fault or offence concept. Insofar as recent years have evidenced legislative changes whereby "irretrievable marriage breakdown" constitutes a ground, sometimes the only ground, for divorce in a number of states⁽⁴⁹⁴⁾, it may be necessary to re-examine the above statements and ascertain whether investigative services should be relied upon to adduce objective evidence as to the viability or breakdown of the marriage where dissolution is sought by either or both of the spouses. This writer concludes that it would be impracticable to implement procedures whereby independent investigators would assume the responsibility for tendering "objective evidence" respecting the viability or breakdown of the marriage in divorce proceedings⁽⁴⁹⁵⁾ and endorses the conclusions of the United States Department of Labor.

There may be, however, a need for independent appraisal of the means and needs of the respective spouses where a corollary claim for inter-spousal maintenance is included in a divorce petition. The traditional use of adversary procedures to determine the means and needs of the parties in such corollary claims is frequently time consuming and, more importantly, may fail to indicate the true state of affairs. It is accordingly submitted that the court should be empowered to order an independent investigation and report of the financial circumstances of the parties prior to disposition of the quantum of maintenance or the enforcement of an existing order.⁽⁴⁹⁶⁾ It is not envisaged that such a power should be indiscriminately exercised and amendments to the form of the divorce petition could themselves achieve a great deal to secure relevant financial information for the court to consider on disposition of the issue of quantum.⁽⁴⁹⁷⁾ Substantial advantages could also be achieved by legislation empowering the court to require an employer to furnish a written certificate of wages or salary that would be admissible in evidence on the issue of quantum. The court could also be empowered to require the disclosure of any relevant information contained in the records of the Unemployment Insurance Commission or any government agency. Such disclosures would be relevant not only to determine the financial circumstances of the parties but also to trace the whereabouts of a spouse who had abandoned family dependants.

It has already been observed that investigative services are presently relied upon to some extent in custody proceedings. There appears to be a consensus of opinion favouring the use of investigative services in this context. For example, in formulating proposals for the establishment

a Family Court in Hawaii, the Commission on Children and Youth stated:

"The judge receives his information on the family through a special investigation commonly referred to as a social study, which includes pertinent social, psychological, psychiatric and medical information, prepared by members of his specialized services staff or by a referring agency. Such a study, however, should not be used by the court in determining such matters as whether a divorce should or should not be granted since its use would conflict with sound judicial process and legal principles. On the other hand, the study would be highly desirable in cases involving custody wherein parents seem incapable of planning adequately for their children and in situations where custody is contested. In the latter case a social study should be mandatory to enable the court to have adequate information for determining which, if either, parent should be granted custody or whether custody should be given to another person or to an agency. The decision that neither parent should be granted custody should be made on essentially the same grounds as would justify removal of a child from his parents in a neglect proceeding because of parental inability to meet minimum standards of responsibility. A social study would also be helpful in determining support and visitation. Juvenile courts throughout the nation have relied heavily upon social studies in cases of juvenile delinquency and dependency." (498)

The proposals of the Commission on Children and Youth were substantially implemented in sections 333-23 and 333-23.5 of the Family Court Act, Hawaii. These sections provide as follows:

"Sec. 333-23. Investigation prior to disposition. Except where the requirement is waived by the judge a social study and a report in writing shall be made in the case of a minor concerning whom a petition has been filed under subsections (a) and (b) of section 333-8 of this chapter. Such study shall be initiated upon the filing of a petition except in petitions filed under subsection (a) of section 333-8 of this chapter when it is ascertained that the minor denies the allegations set forth in the petition. In such case the study shall proceed only after the court after hearing has made a finding as to the allegations of the petition.

Except where the requirement is waived by the judge, social studies shall also be made in proceedings to decide disputed or undetermined legal custody and in custody disputes arising out of a divorce action. In all other awards of custody arising out of a divorce action, including those where an agreement with respect to custody has been made by the parties, and in any other case or class of cases, the judge may order a social study when he has reason to believe such action is necessary to assure adequate protection of the minor or of any other person involved in the case. The judge by special order or by rule of court may require a social study in support cases covering financial ability and other matters pertinent to making an order of support. The use of such studies in custody and support hearings shall be subject to the applicable provisions of section 333-19.

Social studies required by this section shall be presented to and considered by the judge prior to making disposition.

The judge shall have authority to order and use a pre-sentence investigation with respect to any criminal action under the jurisdiction of the court in accordance with the existing provisions of the law with respect to the making and use of such studies.

Sec. 333-23.5. Criteria and procedure in awarding custody. In actions for divorce,

separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court may, during the pendency of the action, at the final hearing or anytime during the minority of the child, make such order for the custody of such minor child as may seem necessary or proper. In awarding the custody, the court is to be guided by the following standards, considerations and procedures...

(d) Whenever good cause appears therefor, the court may require an investigation and report concerning the care, welfare and custody of any minor child of the parties. When so directed by the court, investigators or professional personnel attached to or assisting the court shall make investigations and reports which shall be made available to all interested parties and counsel before hearing, and such reports may be received in evidence if no objection is made and, if objection is made, may be received in evidence provided the person or persons responsible for such report are available for cross-examination as to any matter which has been investigated.

(e) The court may hear the testimony of any person or expert produced by any party or upon the court's own motion, whose skill, insight, knowledge or experience is such that his testimony is relevant to a just and reasonable determination of what is to the best physical, mental, moral and spiritual well-being of the child whose custody is at issue." (499)

The Report of The Governor's Commission on the Family, California, 1966 also strongly endorsed the opinion that investigative services should be utilized by the court in custody dispositions but emphasized the dangers of a mandatory or universal procedure. The Report stated:

"We believe that the controlling standard in child custody cases must be in fact, as it now is in theory, the best interests of the child in all cases. We also believe that the primacy of parental rights to custody must be preserved, while at the same time the Court

should be allowed, upon a specific finding that the child's welfare requires it, to award custody to a person other than the parent without finding the parent wholly unfit—which has the effect of terminating his rights to and relationship with the child. Our proposed statute seeks to accomplish these ends.

We believe, further, that the effective implementation of this standard requires that the Court be able to call for a full investigation when it feels it necessary. We rejected the concept of mandatory investigation in all cases involving children below a certain age (which is the practice in the Toledo Family Court) as being too costly and wasteful of staff time upon cases that may not require it. Likewise, we rejected the notion that investigation should be limited to disputed cases. The Court has an obligation to ensure that the custodial award is in the child's best interests, and should not be foreclosed from inquiry by the agreement of the parents.

We recommend, therefore, that the Court be empowered to order an investigation and report by the Court's professional staff whenever it believes that good cause for such investigation exists. We recommend that the report be made available prior to hearing, and that it may be received into evidence without stipulation of the parties, on the condition that the person preparing the report and the persons furnishing information for it shall be called by the Court as its witnesses for cross-examination on motion of any party.

In examining the situation of the child whose custody is disputed, in the light of our conclusion that his best interests must be the governing factor, we came to the conclusion that in some cases, the meeting of the child's needs will require that someone speak affirmatively in behalf of the child, to represent his interests as a deeply concerned and affected party. The report of the professional staff will not do this; it is to be investigatory, not advocative. The Court cannot serve as the spokesman for the child's interests; to place this responsibility upon the Court is to force it to assume two immiscible roles—advocate and arbiter—to the ultimate detriment of both.

We therefore recommend that the Court be specifically enabled to appoint an attorney as a guardian ad litem in custody cases (and indeed in any case where good cause exists), to give affirmative representation to the interests of the child. Though we would make it very clear that we do not think it necessary or desirable that a guardian be appointed in every case, or even in most cases. The experience of Wisconsin and Michigan—and of New York, under a variant system—with the use of guardians ad litem appears to have been good, and we believe that the plan is worthy of serious trial." (500)

The conclusion that the use of investigative procedures in custody proceedings should lie within the discretion of the court and not be mandatory and universal has been legislatively endorsed in New Zealand. Thus, section 8 of the Domestic Proceedings Act (New Zealand), 1968, which applies in proceedings instituted in the Magistrate's Court, provides:

"8. Court may call for report—(1) In any proceedings under this Act relating to any child, the Court may, if it thinks fit, request any Child Welfare Officer to make to the Court a report in writing on any matter relevant to the welfare and maintenance of the child. The officer shall report accordingly.

(2) In any proceedings under this Act in relation to maintenance, the Court may, if it thinks fit, request any officer of the Social Security Department to make to the Court a report in writing on the means, earning capacity, and economic circumstances of any party to the proceedings and on any matter relevant thereto. The officer shall report accordingly.

(3) A copy of the report shall be given by the Registrar to the solicitor or counsel appearing for each party to the proceedings or, if any party is not represented by a solicitor or counsel, to that party.

(4) Any party to the proceedings may tender evidence on any matter referred to in any such

report which is given or shown to him or to his solicitor or counsel. The Court may if it thinks fit on the request of any party call the person making the report as a witness." (501)

And section 50 of the Matrimonial Proceedings Act (New Zealand), 1963, which regulates proceedings in the Supreme Court, provides:

"50. Court may call for report—(1) In any proceedings for dissolution of a voidable marriage or for divorce, the Court may, if it thinks fit, request any Child Welfare Officer appointed under the Child Welfare Act 1925 or any Welfare Officer appointed under the Maori Welfare Act 1962 to make to the Court a report in writing on the arrangements proposed by the parties or either of them for the custody, maintenance, and welfare of any child of the marriage and on any matter relevant thereto. The Officer shall report accordingly.

(2) A copy of the report shall be given by the Registrar to counsel appearing for the petitioner and the respondent or, if either party is not represented by counsel, to that party.

(3) The petitioner or respondent may tender evidence on any matter referred to in any such report.

(4) In any proceedings for the dissolution of a voidable marriage or for divorce, any such Officer shall, at the request of the Court, appear to assist the Court with respect to any matter relating to the custody, maintenance, and welfare of any child of the marriage."

The undesirability and impracticability of implementing mandatory and universal investigative procedures in custody proceedings has been emphasized in the Report of The Royal Commission on Marriage and Divorce, England, 1951-1955, wherein it is stated:

"372. After a very careful examination of all aspects of the problem of children in divorce proceedings we have come to the conclusion that what is needed is a procedure which, firstly, will ensure that the parents themselves have given full consideration to the question of their children's future welfare, and secondly, will enable the control of the court over the welfare of the children to be made more effective. We think that these two aims are most likely to be achieved by a statutory provision that a divorce cannot be obtained until the court is satisfied as to the welfare of the children and we are recommending accordingly. ...

373. We recommend that it should be provided by statute

- (i) that in every divorce case the court must be satisfied that the arrangements proposed for the care and upbringing of any children under sixteen years of age are the best which can be devised in the circumstances, and
- (ii) that, until the court is so satisfied, the *decree nisi* must not be made absolute; provided that, if there are exceptional circumstances, the court may allow the *decree nisi* to be made absolute on an undertaking being given by the party who has obtained the decree to bring the question of the arrangements for the children before the court within a specified time.

374. To enable the court to discharge this duty, it is obvious that it must have before it adequate information about the arrangements proposed. We therefore recommend that the petitioner (and, if custody is contested, the respondent as well) should be required to submit to the court a written statement setting out in detail the proposed future arrangements for the care and upbringing of the children. Further, since we contemplate that sometimes the court may be unable to come to a decision on the basis of the statement and evidence, we recommend that provision should be

made for investigation and report by a court welfare officer in such cases as the court may direct. ...

383. A possible difficulty to which our witnesses referred was that, short of requiring investigation in every case, there were no means of deciding when investigation would be appropriate, and, indeed, it was primarily for this reason that they recommended investigation and report by a welfare officer in every case. We do not consider that that difficulty will arise under our proposal. Usually there is no dispute between the parties over the arrangements for the children. The judge will have before him a written statement by the petitioner which will be sufficiently detailed for him in most cases to assess the soundness of the proposed arrangements. He will be able to put questions to the petitioner on the basis of the statement; normally this should suffice. Sometimes, of course, questioning on the written statement will not prove sufficient. This might happen, for instance, when there is a husband petitioner who does not apply for custody since he is content that the children should remain with the mother. The petitioner has, however, to assume responsibility for the written statement and must be prepared to face questioning on it in the witness box. The burden will thus rest upon him before coming to court to satisfy himself that the respondent is able to look after the children. The ages of the children, their past and present homes, and the nature of the ground of divorce will in addition be relevant, though not in themselves determining, factors. In these circumstances, while we contemplate that the court will sometimes call for a report from the court welfare officer, we see no reason to believe that a report will prove necessary in all, or even in the majority, of such cases. Where custody is contested, greater difficulty may arise, and here we contemplate that a court welfare officer's report will be called for more frequently. The number of such cases should not, however, be inordinate, since there is a dispute over custody in only some five per cent of the total number of divorce suits in which there are children.

385. We have already explained why, on grounds of principle, we rejected the proposal that a welfare officer's report should always be called for if there are children. Apart from those considerations, we found this proposal unacceptable on practical grounds. It is obvious that if there were to be investigation in every case where there are children a very large number of officers would be necessary. The benefits achieved would often be negligible and could not justify the expense which such investigation would entail. Even if financial considerations were irrelevant, it is almost certain that sufficient experienced social workers could not be made available to undertake this work.

386. While it is an essential feature of the scheme which we propose that there should be a service of court welfare officers, the demands on it should not in our view be excessive. We see no need to set up a special service of officers to be engaged solely on this work, even assuming that an adequate number could be found." (502)

The advantages of conferring a discretion on the court as to the use of investigative procedures and the disadvantages of mandatory and universal investigative procedures have also been elucidated in the following observations of Judge Roger A. Pfaff of the Conciliation Court of Los Angeles County:

"[There] is little controversy any more about the utilization of social workers solely for investigative purposes to assist the court in reaching an equitable and just conclusion, although a cursory review of appellate court decisions as to the admissibility and use of these reports clearly indicates that the judicial philosophy and attitude is still that domestic relations cases are adversary proceedings and that the same rules of evidence apply to them as to a personal injury or assault and battery case. Some more enlightened jurisdictions are approving rules which endeavor to eliminate adversary aspects as far as possible in domestic relations cases and to establish procedures that will furnish the court with accurate information to assist him in making

a decision for the best interests of the minor children and the parties.

A qualified and experienced social worker's report in domestic relations cases saves countless hours of court time and provides the means to settle amicably a case that otherwise would result in bitterness and future litigation.

In the Domestic Relations Court of Los Angeles County a qualified and experienced investigator's report in a contested custody case very often is the means of providing an amicable solution to the controversy. But this process can be misused. It is all too easy to order such an investigation perfunctorily when there is no real necessity to do so and thereby overload the staff of investigators with so many cases that several undesirable results occur: (1) the investigative process becomes routine; (2) the investigator becomes fatigued; (3) the large case load means that a report may be delayed for as much as several months, which in some cases defeats the whole purpose of the investigation; and (4) the expense is increased by unnecessary investigations.

It is our practice in Los Angeles to inquire in each case in which an investigation is requested as to its need, and one is ordered only when it is clearly demonstrated that it will be of some benefit.

The investigators in Los Angeles are attachés of the court, paid by the court and directly under its jurisdiction. Their reports are filed as sealed exhibits, to be opened only on order of the court, thereby eliminating the possibility that some nosy neighbor or children at some future date may read statements, of which much is hearsay and damaging, yet all of which may be most valuable to the court in making a proper decision.

In 1962 we eliminated the recommendations by the investigator, which formerly

were made a part of each report. It was found that the recommendations served little purpose and only invited criticism and antagonism from attorneys. If the court reads the investigator's report, which we assume it does, it can make up its own mind what to do without being told by the investigator." (503)

This writer endorses the opinion that the court should be statutorily empowered to order an investigation and report for the purpose of determining the custody of children in inter-spousal proceedings and concludes that the utilization of such investigative procedures should fall within the discretion of the court and should not be mandatory or universal.

Having examined the prospective role of investigative services in divorce and other inter-spousal proceedings, it is appropriate to consider the role of such services in neglect or delinquency proceedings and inter-familial criminal proceedings. In recent years, there has been a growing body of opinion in North America that favour two separate hearings in such proceedings, the first being adjudicatory, the second being dispositional. (504) With respect to such bipartite proceedings, it is generally conceded that the court should not consider or examine investigative reports at the adjudicatory hearing but that such reports should be available to the court in any subsequent dispositional hearing. Thus, the Report of The President's Commission on Law Enforcement and Administration of Justice in the United States stated:

"Juvenile court hearings should be divided into an adjudicatory hearing and a dispositional one. The evidence admissible at the adjudicatory hearing should be so

limited that findings are not dependent upon or unduly influenced by hearsay, gossip, rumour, and other unreliable types of information." (505)

With regard to this recommendation, the Commission observed:

"Perhaps the height of the juvenile court's procedural informality is its failure to differentiate clearly between the adjudication hearing, whose purpose is to determine the truth of the allegations in the petition, and the disposition hearing, at which the juvenile's background is considered in connection with deciding what to do with him. In many juvenile courts the two questions are dealt with in the same proceeding or are separated only in the minority of cases in which the petition's allegations are at issue. Even where adjudication and disposition are dealt with separately, the social reports, containing material about background and character that might make objective examination of the facts of the case difficult, are often given to the judge before adjudication. Practices vary on disclosure of social study information to the juvenile and his parents and lawyer, if he has one.

Bifurcating juvenile court hearings would go far toward eliminating the danger that information relevant only to disposition will color factual questions of involvement and jurisdictional basis for action." (506)

The importance of distinguishing adjudicatory and dispositional hearings relating to juvenile delinquency for the purpose of determining the use of investigative reports was also emphasized in the Report of the Department of Justice on Juvenile Delinquency in Canada. This report stated:

"265. Informality of procedure in the juvenile court is undoubtedly desirable. However, it should not be equated with the absence of the traditional kinds of protection that the rules of criminal procedure are designed to provide. A court is not justified, for example, in basing its judgment on uncorroborated admissions, hearsay evidence or contested assertions in social investigation reports. We have been told of courts that will sometimes arrange for a psychiatric examination of a child charged with an act of delinquency, or direct that a probation officer conduct an investigation into the child's background, and all of this prior to a determination that the child is, in fact, delinquent. Such practices have no sanction in law. They are, in fact, a clear violation of a child's fundamental civil rights. Until the child is found to have committed the act complained of, the state should have no right to infringe the child's interests in preserving his privacy except in the most urgent cases. A child considered so mentally ill or feeble-minded as to be unable to instruct counsel must be examined by scientific experts. Again, a child held in detention will have to be given a physical examination to ensure that he is not a carrier of contagious diseases. A judge who is contemplating waiver of a case to the adult court is justified in ordering a social investigation of the child, provided that he is satisfied at a hearing that there is a reasonably strong case against the child. However, these are the only situations we can visualize where there is a sound reason to invade the child's right of privacy." (507)

Although the Report on Juvenile Delinquency in Canada emphasized that the civil and legal rights of the child must be effectively protected and that the use of investigative reports based on hearsay evidence should not be admissible at an adjudicatory hearing, it strongly endorsed the use of investigative reports where a finding of delinquency has

been made and the issue of an appropriate disposition arises for the consideration of the court. Thus, the Report stated:

"Diagnosis and Treatment Plan

278. Under the Act the judge's real difficulty arises when he finds the child before him to be delinquent. The judge's problem then is to determine which of the possible choices of disposition will best meet the circumstances of the case before him. In most cases the facts disclosed in the proceedings to this stage will be an insufficient basis upon which to make a sound decision concerning the way to deal with the child. The court can obtain the necessary additional knowledge of the child by various means. It can order a pre-sentence report or a psychological or psychiatric investigation and, if necessary, have the child held in detention pending investigation.

Pre-sentence Reports

279. The preparation of adequate pre-sentence reports takes time. It is clearly not the proper function of the judge to prepare them. The only person mentioned in the Act as having anything like this responsibility is the probation officer. In another section of our Report we examine the role and structure of probation services. At this point we merely note that probation staffs generally are carrying caseloads so high that often the pre-sentence reports presented to the court are no more than cursory in nature. In some areas no probation officer is available to assist the court. In such circumstances it is difficult to make a fair appraisal of the suggestion, made by many, that a pre-sentence report should be mandatory in every case. Nevertheless we recommend that, at the very least, no judge should be authorized to commit a child to an institution or to authorize his removal from the home in any way without first having considered a pre-sentence report in respect of that child.

Psychological and Psychiatric Investigation

280. In some cases the investigations incidental to the pre-sentence report will disclose factors indicating the need for an intensive appraisal of the

child's intelligence and personality. Occasionally the act committed by the child - arson or sexual assault, for example - may show the same need even without a pre-sentence report. Although the need for this intensive psychological and psychiatric appraisal of the child may be evident, the problem is that in Canada we lack the personnel and facilities to provide the service. Very few courts have readily available the necessary psychologists and psychiatrists. Only a few have diagnostic clinics attached to them. Others must rely on services provided by agencies such as mental health clinics. Unfortunately these clinics are already overburdened. The waiting lists are extremely long, although it should be noted that the clinics generally attempt to give priority to juvenile court cases. The problem here is not solely one of financing. Canada just does not have enough psychologists and psychiatrists, nor is there any indication that it will have a sufficient number in the reasonably near future. Most psychiatrists are in private practice and, accordingly, are not usually available to serve the needs of the juvenile court. We have no solution to the problem, which is urgent even in the metropolitan areas of our country. In sparsely populated regions the problem may well be insoluble, except for temporary or occasional assistance of psychiatrists from the nearest community mental health clinic or mental hospital." (508)

This writer endorses the concept of separate adjudicatory and dispositional hearings in proceedings involving juvenile delinquency, neglect and inter-familial crimes and concludes that investigative reports should not be submitted to the court or admissible in evidence at an adjudicatory hearing but should be available and admissible, if the court so orders, at a dispositional hearing. The writer also endorses the recommendation in the Report on Juvenile Delinquency in Canada that no judge should be authorized to institutionalize a juvenile delinquent without first having considered a pre-sentence report in respect of that child. (509)

2. To what extent should investigative reports be made available to

affected parties or their counsel? Should an opportunity for cross-examination of the investigator and/or of his sources of information be available as of right?

Reliance upon investigative reports in matrimonial, familial and juvenile proceedings poses difficult problems in a search for a balance between the interest of confidentiality and the right of affected parties to have access to and question the validity of evidence thereby introduced. Practices respecting the confidentiality or disclosure of investigative reports vary considerably as does also legislative regulation of such practices.

The dilemmas posed by the questions under consideration and illustrations of various statutory responses thereto are the subject of the following comments by Elizabeth and Richard Dyson:

"The use in evidence of social studies or other background report presents something of a problem. By their very nature, such reports necessarily contain a good deal of hearsay, opinion, gossip and 'what the neighbors think.' Information like this may be a real help to the judge in deciding questions of custody, visitation rights, or allowable amounts for support. Yet it is possible that the kind of material contained in these reports might inflict psychological harm on the parties if disclosed to them, and it has been suggested that potential sources of information might refuse to talk if they knew that their identity might be revealed. Should the reports be open to examination by the parties and their lawyers, given these factors?

We have already suggested that an adjudication of delinquency could well be unconstitutional if based entirely upon probation material containing statements by persons out of court. And to the extent that such reports are relied on by the trier of fact at the adjudicatory stage of a hearing, the Supreme Court has already indicated that they must be disclosed, at least in the federal system. But whether fairness requires disclosure at dispositional hearings has not been directly dealt with by the Supreme Court.

On the controversial question of disclosure of reports, the Standard Act takes no position. Rhode Island's statute makes studies conducted by the Corrections Department or the Bureau of Mental Hygiene subject to examination in court, but is silent concerning other kinds of investigatory reports. In practice judges do let attorneys see juvenile probation reports upon request, although the court administrator has said that 'lawyers don't ask much to see them—they haven't digested *Kent* and *Gault* yet.' But where the divorce investigators have checked suspicious cases for the judges, attorneys are not usually informed that an investigation has taken place—much less that a report has been submitted to the judge.

Hawaii gives full rights to parties to inspect reports and subject their authors to cross-examination, at the dispositional phase of all juvenile, support, and custody cases.

New York is most restrictive. In neglect, support, termination of parental rights, and JD-PINS proceedings, all social reports at the dispositional phase of a hearing may be withheld at the discretion of the judge. This secrecy has been criticized by some observers, on the ground that judges may arrive at dispositional decisions wholly on the basis of evidence never subjected to scrutiny by counsel in court. Other critics have pointed out that if lawyers are denied access to probation reports, they can play only a minimal role at a dispositional hearing.

One family court judge has pointed out even though '[t]he theory of the Family Court Act...seems to be that legal rights are determined, and adversary methods appropriate, only in the first, "fact-finding"

stage of the proceeding,' there are many instances where legal rights are as important at the dispositional stage as they are at the fact-finding stage. For instance, 'a fact-finding of neglect does not necessarily mean that custody will be removed from the parents; whether either or both parents may nevertheless continue to exercise custody and care is decided in the dispositional phase. Thus, both phases of a neglect proceeding taken together determine, as in a custody proceeding, whether to deprive the parent of his ...[rights].'

Recognizing the importance of the dispositional phase to questions of right and status, this judge has held that the principles of fairness governing admission of psychiatric reports in supreme court custody cases should apply to proceedings in the family court. Specifically, when psychiatric reports are admitted in evidence:

- '(1) All factual data must be disclosed;
- (2) the tenor of the psychiatrist's diagnoses and recommendations must be disclosed, unless the Court deems it desirable from the therapeutic standpoint to suggest a stipulation for nondisclosure in that regard and the parties so stipulate; (3) the remainder of the report, which would usually consist of detailed and specific psychiatric observations and opinion, should be disclosed unless therapeutic or other policy considerations interdict.'

The court also held that psychiatric reports may not be admitted into evidence without a proper foundation; and it excluded a letter from a private psychiatrist who was not available for direct examination of credentials, or for cross-examination concerning the substance of the letter. Reports of court psychiatrists were admitted by the court, however, because '[t]he staff psychiatrists of the Court's Bureau of Clinical Services' were 'well-known to the Court both as to qualifications and standard methods of examination,' and 'an insistence on the Court psychiatrists' routinely appearing as witnesses would drastically curtail their already insufficient time to render diagnostic and therapeutic services.'

This aspect of the case may put a practical burden on law guardians wishing to counter court test results with their own psychologists' tests. If the ruling is followed by other family court judges, then law guardians may have to put their privately employed psychologists or psychiatrists upon the witness stand in order to have their diagnoses introduced. This would significantly add to the cost of employing independent testing personnel." (510)

The right of affected parties to receive copies of an investigative report is strongly endorsed in the Report of The Governor's Commission on the Family, California, 1966. Commenting on this Report, Richard C. Dinkelspiel and Aidan R. Gough have observed:

"It must be stressed that it is the conviction of the Commission that the decisional process is the province of the court, not the counselor. The latter's function is to investigate and to counsel, not to adjudicate. Copies of the report should therefore be given to the parties or their counsel, and every right to present additional or contravening evidence is preserved in the proposed Act." (511)

In a more detailed comment on the recommendation of The Governor's Commission on the Family respecting investigative reports in custody matters, Professor Herma H. Kay condemned the practice whereby attorneys waive their right to examine the investigator and release him from any obligation to attend the hearing. Professor Kay also emphasized the need to ensure a right to cross-examination irrespective of the status of the witness. Professor Kay stated:

"A second recommendation deals with investigations of child custody matters by members of the court's professional staff. Present law permits the larger counties to employ domestic relations investigators who will investigate and report to the judge 'all pertinent information as to the care, welfare, and custody of the minor children of the parties to the divorce action.' The practice has developed in Los Angeles County of having the attorneys who represent both parties stipulate that the investigator's report will be received in evidence and that the investigator need not be present in court at the time of the hearing. Since this stipulation is made before the custody investigation commences, an attorney has no way of knowing whether the material contained in the report will be damaging to his client's position on the custody issue. And, since the stipulation means that the investigator will not be available for cross-examination as to matters contained in the report, the attorney has no way of attacking an unfavorable report short of calling as witnesses the persons interviewed by the investigator. This course is itself dangerous because present law is unclear whether a person so called becomes the witness of the party who called him, thus requiring counsel to run the risk of being bound by the witnesses' testimony without being able to cross-examine him. Since present law clearly provides that the domestic relations investigators shall be present at the hearing and may be called to testify and be subject to cross-examination, the Los Angeles practice seems a clear evasion of the statutory policy.

An asserted justification for the Los Angeles practice is that dispensing with cross-examination saves the investigator's time so that he can deal with his heavy caseload. Some may also argue that disallowing cross-examination helps to reduce the adversary atmosphere in custody cases. It seems, however, that requiring counsel to call as witnesses the persons interviewed might cause more antagonism than a cross-examination of the investigator who may be able to clear up any misunderstandings or ambiguities in his report easily and simply. As to timesaving, one may suggest that surrendering the valuable and traditional protection of cross-examination is too high a price to pay for efficiency. Accordingly, the Commission reiterated the present position of the law that the investigator must appear in court and be available for cross-examination.

It further specifically recommended that the statute expressly provide that the right of cross-examination shall not be waived by any party prior to the hearing." (512)

The opinion that disclosure of investigative reports should be mandatory in order to facilitate relevant cross-examination of the investigator and the submission of rebuttal evidence has not met with universal approval. Commenting on the discretion of the Judge of the Family Court of New York to treat the whole or part of an investigative report as confidential, Elloeen Oughterson has stated:

"The development of the specific concept of a dispositional hearing and of counsel who have a supplementary function in the aid of the court has presented a problem with reference to the materials and records available to the judge on such hearing which are not adduced in court and are not subject to the regular rules of evidence. The Committee determined first that such information was confidential to the court and to the parties in interest, except that medical and psychiatric data would be withheld from the parties in the discretion of the court. However, since most family courts and their official probation services are, in their functions as social agencies, members of social service exchanges, there was universal disapproval of a mandatory disclosure to the parties, so the final provisions which appear in several places permit the court 'in its discretion, [to] withhold from or disclose in whole or part to the law guardian, counsel, party in interest, or other appropriate person' such confidential reports and information." (513)

And Professor Monrad Paulsen has observed:

"One procedural problem which gives rise to a painful dilemma is the extent to which probation reports should be made available to parties affected by them. While the reports may not be employed in adjudicatory hearings, they frequently determine,

as a matter of fact, the most important issue in a case: shall a youngster be returned home or sent for a long period of time to a disciplinary barracks? The dispositional judgment will be based on reports of a child's history, attitude, school record, relationships to his fellows, his family, and the like. Obviously, the reports may be false, distorted or incomplete. The youth cannot correct an account unknown to him. If the report is not made available to the child, only the professional discipline and personal concern of the probation officer or other reporter are safeguards against errors in documents.

On the other hand, social work agencies insist that they cannot operate successfully if they do not protect their informants. They must ask for confidential information and must respect the promise of confidentiality. Often, too, a report will contain information from a parent, which, should a child know of the parent's statement, might destroy the only hope for a youngster — the strengthening of parental ties.

The Family Court Act has resolved the dilemma by calling the reports 'confidential information' but permitting the court, 'in its discretion [to] withhold from or disclose in whole or in part to the law guardian, counsel, party in interest, or other appropriate person.'" (514)

In an analysis of the law and practice in England, Dr. Olive Stone also endorses the discretion of the court to withhold investigative reports from the parties, if not their counsel. Dr. Stone has observed:

" In the English magistrates courts there are special statutory provisions designed to ensure that parents should have ample opportunity to hear and, if they wish, to challenge reports made to the courts by the welfare officer; the reports are to be made orally, or if in writing, are to be read aloud before the court, which will then ask whether any party objects to any of the contents. If objection is made, the officer making the report will give evidence on oath, which of course means that he will be subject to cross-examination, and any party may give or call additional evidence.

The problem of disclosure is also acute in respect of reports to the courts by welfare officers or guardians *ad litem*, which may well refer to the attitude to the parent of the children concerned. If the child's attitude is unfavourable to the parent who is eventually awarded custody, and that parent is entitled to insist, as of right, on disclosure to him of all statements made by the child, difficulties may manifestly arise. On the other hand, if the parent is not entitled to disclosure, an award may be made against him on evidence which he cannot controvert because he does not know what evidence is advanced. In a case arising under the prerogative power of the Chancery Division over Wards of Court, this question was taken as far as the House of Lords recently in *In re K.* [1965] A.C. 201, and their Lordships, overruling the Court of Appeal, held that where a parent invokes the inherent jurisdiction of the Chancery Division by having a child made a Ward of Court, the paramount consideration of the court is the welfare of the infant, and the jurisdiction exercised is a paternal jurisdiction. Thus the case is of an administrative character and is not a mere conflict between contending parents. Therefore, their Lordships held, the disclosure of confidential reports by the guardian *ad litem*, (who in the High Court is the Official Solicitor) is a matter of discretion for the judge, and the parent is not entitled as of right to disclosure of such reports. Their Lordships stressed, however, that confidential reports should not be submitted to the court as a matter of routine, but only in exceptional cases when the Official Solicitor believes that the disclosure of certain information might be harmful to the infant, and that in such cases the Official Solicitor should state to the judge the reasons for non-disclosure to the parties. The judge should then satisfy himself that any undisclosed information to which he proposes to pay regard is in truth reliable, and when the information is derived from some statement attributed to the Ward, the judge should himself see the Ward. In the words of Lord Evershed, who has great wisdom and experience in jurisdiction over infants, 'a judge should not reach such a conclusion without the relevant disclosure to the party or parent save in rare cases and where he is fully satisfied judicially that real harm to the infant must otherwise ensue.' Some learned commentators have criticised the decision adversely, but in this matter I find myself on the side, if not of the angels, then of the House of Lords, particularly having regard

in this particular cases, to the mother's imperious insistence upon her 'rights'. She had instructed her legal advisors that they were not to accept disclosure to them of the contents of the reports on the understanding that they would not divulge these to her personally, which is the compromise normally adopted in such circumstances, and which the trial judge at first instance had suggested should be adopted in this case.

On a comparable point in the Divorce Division, the Court of Appeal held in December 1962 in *Fowler v. Fowler and Sine* [1963] P.311 that the ordinary principles of judicial enquiry must be observed in that division in relation to custody matters, and that therefore on an application for custody of children in which a welfare officer's report had been received, the judge was not justified in interviewing the welfare officer in private. It would seem that this decision cannot now stand and must be considered impliedly overruled by the decision of the House of Lords in *In re K.*, particularly since Lord Hodson emphasized in his judgment in the House, that the procedure to be observed in relation to custody of children was the same in all divisions of the High Court, and some observations made by Lord Devlin appear to point in the same direction." (515)

A viable compromise solution to the problems encountered in this context was adopted by the Office of the Civil Code in the Working Paper on the Establishment of a Family Court in Quebec. Recommendation 51 of that Working Paper provided:

"RECOMMENDATION # 51:

THE COMMITTEE RECOMMENDS THAT THE SPECIALISTS' REPORTS (SOCIAL INVESTIGATOR, MARRIAGE COUNSELLOR, PSYCHIATRIST OR OTHERS) BE TRANSMITTED, WITHIN A REASONABLE TIME, BEFORE HEARING, TO THE PARTIES' ATTORNEYS AND, AT THE DISCRETION OF THE COURT, TO THE PARTIES THEMSELVES, THAT THE AUTHOR OF THE REPORT MIGHT BE CROSS-EXAMINED BY THE PARTIES OR THEIR ATTORNEYS AND THAT, IN CASES OF JUVENILE DELINQUENCY, THE SOCIAL INVESTI-

GATION REPORTS BE TRANSMITTED TO THE JUDGE ONLY ONCE THE JUDGMENT HAS BEEN RENDERED ON THE CHARGE." (516)

The above recommendation may be contrasted with the following proposals set out in Recommendation 15 of the Working Paper on Family Court prepared by the Institute of Law Research and Reform, Alberta:

"Recommendation # 15:

...(3) That counsellors of the investigative service should prepare reports when requested to do so by the court upon its own motion or upon application.

(4) That the report of the investigating counsellor should be made available to both parties in advance of the trial and that the investigating counsellor should be available for cross-examination by either or both parties." (517)

The compromise solution adopted in the Quebec Working Paper, whereby disclosure to counsel but not to the parties is mandatory, is echoed in the Report of the Department of Justice on Juvenile Delinquency in Canada. It is therein stated:

"281. The problem of the confidentiality of 'background' information has troubled us, as it has troubled every group that has studied the problem. The dilemma is this: if the background information - the child's history, attitude, family relationships, and the like - is not made available to the child, then the court, in disposing of the case, may be acting on false or incomplete reports. There is the danger that the court will then make a disposition that is felt to be unjust by the child or his parents, or indeed, by the public. On the other hand, probation officers, social service agencies, psychologists and psychiatrists insist that confidentiality is essential if they are to be able to obtain confidential information

from school teachers, neighbours and other sources. Moreover, disclosure of some kinds of information may have harmful effects on the child as, for example, when he discovers that he is illegitimate or that his mother is a prostitute.

282. The New York Family Court Act solves the problem by empowering the court 'in its discretion (to) withhold from or disclose in whole or in part to the law guardian, counsel, party in interest, or other appropriate person' this type of information. The procedure in the English juvenile court is quite different. The child must 'be told the substance of any part of the report bearing on his character or conduct which the court considers material....'. The parent must also be told the substance of any material part of the report relating to him.

283. Under both procedures the ultimate protection of the child's interests is the responsibility of the court. The English procedure places heavy demands on the court's time; the New York procedure on the court's skills. We recommend that all reports received by the court should be disclosed to the child's counsel. It will then be counsel's responsibility to decide how much of the information disclosed therein should be revealed to the child or his parents. In exercising his responsibility he will have the great advantage that the child and his parents repose their confidence in him. Where the child is defended by a person other than legal counsel that person, even if the parent, should be permitted to peruse the reports if he so requests. We think that, ordinarily, the court should direct, in such a case, that the contents of the report are not to be disclosed to the child without express permission of the court. We doubt that adoption of our recommendation will deter the presentation of frank and full reports to the courts." (518)

This writer concludes that the compromise solutions favoured in the Quebec Working Paper and in the Report on Juvenile Delinquency constitute the most effective means of resolving the dilemmas presently confronting the court in matrimonial, familial and juvenile proceedings.

3. To what extent should hearsay evidence be admissible by way of an investigative report?

The writer has already emphasized the need to distinguish between the use of investigative reports in adjudicatory and in dispositional hearings. In so far as such reports are used in a dispositional hearing, it is generally conceded that infringement of the hearsay rule is legitimate provided that the affected parties or their counsel have an opportunity to examine the report and cross-examine the investigator on his findings and opinions.⁽⁵¹⁹⁾

4. Should an investigator have access to Family Court intake files or to the files of a counsellor who has attempted to reconcile the parties or conciliate their differences?

In the Working Paper on Family Court prepared by the Institute of Law Research and Reform, Alberta, it was recommended that information received by an intake counsellor should be absolutely privileged from production in court, directly or indirectly, but that the intake file together with other files in the possession of the court should be available to the investigative services as a basis for their investigation.⁽⁵²⁰⁾ The Institute of Law Research and Reform reasoned that the need for confidentiality at intake and presumably during counselling was outweighed by the need for comprehensive discovery of relevant information on investigation, without undue duplication of effort. In the final analysis, the compromise solution adopted by the Institute of Law Research and Reform was premised upon economic considerations and a supposed lack of qualified personnel.⁽⁵²¹⁾

This writer recognizes the competing interests that the Institute of Law Research and Reform sought to reconcile in its recommendation but concludes that full and frank disclosure at intake and during counseling necessitates a privilege being extended to statements or communications made.⁽⁵²²⁾ The writer further concludes that it would be impracticable to allow the investigative services access to intake and other files while superimposing a requirement that such files cannot be admitted at trial to substantiate the findings and opinions of the investigator. The writer is accordingly of the opinion that the investigative services should be denied any right of access to intake files or to the files of counsellors who have attempted to reconcile the parties or conciliate their differences.⁽⁵²³⁾

5. Should investigative services be attached to or separate from the court?

Diverse views have been expressed concerning the question whether investigative services should be attached to, insulated from, or isolated from the Family Court.⁽⁵²⁴⁾ There appears to be general agreement, however, that a substantial measure of control over investigative services must vest in the court and that the immediate availability to the court of investigative and diagnostic services must be guaranteed.⁽⁵²⁵⁾

The Institute of Law Research and Reform, Alberta, expressed the conclusion that there should be some degree of separation of the investigative services from the court in order that the independence and objectivity of any investigation may be apparent to affected parties. The Alberta Working Paper on Family Court accordingly stated:

" Finally, we point to one other problem that gives us considerable concern and that is: too close an association between the court and someone who is or who appears to be an officer of the court. We believe that a litigant may well receive the impression that the relation between the court and the court counsellor is such that the report of the court counsellor carries undue weight with the judge and that the litigant is not allowed effectively to challenge it. ... [This] is the basic reason for the recommendation which we will make that there should be some separation of the investigative services from the court." (526)

This writer does not share the opinion that there is a vital need to insulate or isolate the investigative services from the court⁽⁵²⁷⁾ and concludes that the apparent objectivity of an investigation or investigative report is more effectively guaranteed by a right of scrutiny and cross-examination than by any geographic segregation of investigative services from the court. It does not follow, however, that all investigative services, including diagnostic clinical services,⁽⁵²⁸⁾ should be attached to the court. Indeed, investigations in proceedings involving adoption, wardship and neglect cases are currently undertaken by Child Welfare authorities within the various provinces and, as is pointed out in the Alberta Working paper,⁽⁵²⁹⁾ there is probably little, if anything, to be gained by centralizing such investigations in the Family Court.

Youth and probation services (including after-care services and detention and observation homes)

The inadequacy of and lack of coordination between facilities and personnel responsible for youth and probation services (including after-care

services, and detention and observation homes) in Ontario have been documented by Chief Judge H.T.G. Andrews, and the situation in Ontario may well be characteristic of other Canadian provinces.⁽⁵³⁰⁾ Current difficulties are compounded by the fragmentation of administrative responsibility and the vital need for integrated social and economic planning is self-evident. In an attempt to resolve present difficulties, Chief Judge H.T.G. Andrews proposed:

"3. That a distinct Youth Counselling Service be developed, to include juvenile probation and after-care, integrated with the Family Courts social response team;

4. That a network of Detention and Observation Homes and Foster (Group) Homes (including use for short-term "open" detention) be developed and interlocked with the Family Court Youth Counselling Service;

5. That the Training Schools continue their programme of development and be co-ordinated with the Youth Counselling Service;

6. That a means be developed to provide adequate psychiatric services to meet the needs of the co-ordination thereof with the other Court resources....." (531)

The first proposal of Chief Judge Andrews was echoed in the Quebec Working Paper on Family Courts. Thus, Recommendations 45 and 46 provided:

"RECOMMENDATION #45:

THE COMMITTEE RECOMMENDS THAT A YOUTH SERVICE BE INSTITUTED AT THE CHILD DIVISION OF THE FAMILY AND CHILD COURT TO SEE THAT THE DECISIONS RENDERED BY THE COURT ARE CARRIED OUT IN THE CASES ENTRUSTED TO IT, TO OFFER AID AND COUNSEL TO THE CHILD, TO FOLLOW HIS DEVELOPMENT AND THAT OF HIS FAMILY ENVIRONMENT, AND TO MAKE PERIODIC WRITTEN REPORTS TO THE COMPETENT AUTHORITY.

RECOMMENDATION #46:

THE COMMITTEE RECOMMENDS THAT A PROBATION SERVICE BE INSTITUTED AT THE CHILD DIVISION OF THE FAMILY AND CHILD COURT TO ENSURE THE SUPERVISION OF JUVENILE OFFENDERS ON WHOM THE COURT HAS IMPOSED PROBATIONARY MEASURES AND TO FOSTER THE REINTEGRATION OF THESE CHILDREN INTO SOCIETY." (532)

Any proposal relating to the establishment or development of specialized youth services inevitably raises the question of the inter-relationship between such services and adult counselling and probation services. In this context, it is generally asserted that some degree of separation should be maintained between juvenile and adult services. In addressing their attention to this issue, the Canadian Corrections Association and the Canadian Welfare Council stated:

" In most communities where there is a family court there is no separate juvenile court, and the work normally done by the juvenile court is undertaken by the family court. Exception to this is found in Alberta where the two courts are distinct in legislation as well as in practice.

Whether these two services are handled by separate courts or not, they are inter-related. The whole family situation must be taken into consideration: a child cannot be treated by the court except as part of a family unit and a family cannot be dealt with by the court without consideration being given to the future of the children.

Despite this intimate relationship, cases involving children should be kept separate from cases involving adults. Wherever possible, separate probation officers should be provided for the adult work and the juvenile work. Provision should also be made for separate waiting rooms for children and adults, or that at least hearings of children's cases be held at a time when adult cases are not being heard. This is

in line with the provisions of sub-section (1) of section 12 of Juvenile Delinquents Act, 1929 [now R.S.C., 1970, ch. J-3]." (533)

The inadequacy of the present probation services and the need to maintain some degree of separation between juvenile and adult services are also emphasized in the Report of the Department of Justice on Juvenile Delinquency in Canada, wherein it is stated:

"302. It was evident to the Committee that most juvenile courts in Canada are not provided with the kind of probation assistance that implementation of the juvenile court concept requires. In some provinces there are no probation services. Children placed on probation are ordered to report periodically to the police department in their own area, to their clergyman or, on occasion, to the juvenile court judge, the director of child welfare or even their own parents. In other provinces probation services have been established only since 1957. In no province are the services adequate. ...

303. We do not see how the administration of juvenile justice can function satisfactorily without the provision of adequate probation services. That the present situation can exist in one of the world's wealthiest countries is not something of which Canadians can be proud. ... At this point we recommend the following steps to alleviate the problem:

(1) Each juvenile court should have available to it the services of at least one probation officer. The desirable goal is to have as many as the burden of work requires.

(2) The probation officer should devote his full time to work involving juveniles, although there may be circumstances where, with the approval of the judge of the juvenile court, he might engage in other correctional activities. Although it may be desirable to broaden the probation officer's viewpoint by affording him experience with adult probationers, we do not see how he can perform effectively all the functions that are expected of him if he is to be responsible for adult as well as juvenile probationers. In sparsely populated areas of the country

it may not be feasible to appoint a probation officer whose services would be devoted exclusively to children. For this reason, the judge of the juvenile court should have authority to permit the officer to work with adults in the same geographical area.

(3) The probation officer should be responsible for pre-sentence investigation and for such personal supervision of a child or young person as may be directed by the court, whether by way of immediate disposition or as after-care following release from institutional commitment. At the present time, in many parts of the country, probation officers perform a number of other functions. It is quite common, for example, for probation officers to undertake family counselling in the community. They may have to assume the responsibility for locating foster homes and supervising foster home placements, for securing placements for psychotic, severely disturbed or mentally deficient children, for the collection of fines and restitution payments. Often they have responsibilities under provincial statutes, notably the enforcement of maintenance orders. Duties of this kind are time-consuming. They leave that much less time available for actual probationary supervision. If such duties are necessary - and frequently they are - then the probation staff should be increased. The assignment of collateral duties should not be permitted to interfere with the proper performance of the probation officer's primary function, which is to provide effective supervision and treatment for those children who can benefit from the probation encounter.

(4) A person having qualifications and capabilities necessary to perform the duties we envisage would be intelligent and well trained. He should be adequately paid. At the very least the probation officer should have a university education. In special cases equivalent experience in correctional or youth work may suffice. Representations were made to us that only qualified social workers should be permitted to engage in probation work. We do not think that social work qualifications are essential, however desirable they may be. The directors of some of the most advanced probation services in North America have indicated that there is no necessary correlation between social work training and success in probation work. In any case, the need for more officers to staff the

services, both existing and needed, would preclude for many years to come an exclusive reliance upon the limited number of graduates of schools of social work. In-service training and orientation programs are, in any event, necessary. Our comments relating to the financing of services are relevant in this context.

(5) Research should be undertaken to determine (a) suitable caseloads for officers, and (b) proper criteria for the selection of offenders for probation. These two matters are closely related. If juvenile offenders who do not need supervision are placed on probation, the caseload of the officer is thereby increased without any advantage to the community. In other words, we need to know what types of offender are likely to succeed without probation; and what types will probably fail, with even the best services, and why. The caseloads of most probation officers in this country are much too heavy. Unduly heavy caseloads result in insufficient supervision for the child and lowered morale for the officer. Although some agencies in the United States have formulated caseload standards we have not been able to find out whether these have been verified by experience or whether the same standards would be applicable in this country.

304. A proper study of the effectiveness of probation supervision would require an analysis, not only of probation caseloads, but also of the frequency of contacts between probation officers and probationers, the time spent in actual counselling the duration of probation orders and the percentage of cases receiving intensive supervision. It would also require some assessment of the intangibles of probation supervision. Probation, it has been said, 'like medicine, is midway between an art and a science. Neither diagnosis nor treatment can be entirely divorced from the personality of its practitioner.' Obviously it has not been possible for us to conduct a study of this kind." (534)

This writer endorses the recommendations and conclusions set out in the Quebec Working Paper and in the Report on Juvenile Delinquency in Canada and also endorses the recommendation of Chief Judge Andrews that a network of detention, observation and foster homes should be developed

and interlocked with the Youth Counselling and Probation Services of the Family Court.⁽⁵³⁵⁾ In this latter context, serious consideration should be given to the feasibility and desirability of implementing in the Canadian provinces the legislative proposals of the United States Department of Health and Welfare respecting detention and shelter care facilities and the criteria for the detention and release of children. Sections 19-23 of the draft legislation proposed by the Children's Bureau of the United States Department of Health and Welfare and pertinent comment thereon read as follows:

"SECTION 19. Detention and Shelter Care Facilities

(a) The ()⁽⁵³⁶⁾ shall develop a statewide plan for the establishment of regional detention facilities for children referred to or under the jurisdiction of the court, and necessary transportation. To implement this plan, the ()⁽⁵³⁶⁾ may construct and operate the facilities or may contract for the use of detention facilities established or operated by local authorities.

(b) The ()⁽⁵³⁶⁾ shall promulgate standards for all detention facilities, including location, design, construction, equipment, care, program, personnel, and clinical services. The ()⁽⁵³⁶⁾ may establish a system of subsidies for the construction and operation, by local authority, of detention facilities meeting the standards established.

(c) To determine whether the standards are being met, at least once a year, the ()⁽⁵³⁶⁾ shall inspect all facilities in which children are detained and shall require reports from them. By order approved by the ()⁽⁵³⁷⁾ the director may prohibit the detention of children in any place which does not meet its standards. Copies of such orders shall be served upon the person in charge of the detention facility and filed with the family court.

(d) The ()⁽⁵³⁸⁾ shall develop a statewide program for the provision of shelter care facilities for children referred to or under the jurisdiction of the court. When such a program involves the use

of local public or nongovernmental facilities, the duties and responsibilities of () (538) with respect to such facilities shall include those provided for in subsections (b) and (c).

(e) All facilities used for detention not under the administration of () (536) shall submit a yearly report to () (536) the substance and form of which shall be determined by () (536)

COMMENT

Ordinarily this section should be part of the legislation providing for the functions and authority of the State executive agency charged with the administration of the State's program for the care and treatment of delinquency. It should be included in the court statute if not provided elsewhere. It has been recognized for some time that if children are to be kept out of jail, a statewide system of detention and shelter care must be developed. Most local jurisdictions will find it impossible from an economic or program standpoint to build and operate their own detention home.

Also the administration of such a program is not appropriate to the judicial role. There is no more logic for a family or juvenile court judge to be administratively responsible for the operation of a detention or shelter care program than for a criminal court judge to be administratively responsible for the operation of jails or other correctional institutions for adults.

SECTION 20. Criteria for Detaining Children.

(a) Unless ordered by the court pursuant to the provisions of this Act, a child taken into custody shall not be placed or retained in detention or shelter care prior to the court's disposition unless detention or shelter care is required:

- (1) to protect the person or property of others or of the child; or
- (2) because he has no parent, guardian, custodian, or other person able to provide supervision and care for him; or
- (3) to secure his presence at the next hearing.

(b) The criteria for detention or placement in shelter care in subsection (a) shall govern the decision of all persons responsible for determining whether detention of shelter care is warranted prior to the court's disposition.

COMMENT

This section is new and somewhat similar to the one in the Uniform Act. It is designed to reduce the number of children in detention by the establishment of specific criteria for use by law enforcement officers and probation personnel. If it cannot be shown that a child's situation falls within the criteria established, he should be released.

SECTION 21. Release or Delivery to Court.

(a) A person taking a child into custody shall, with all reasonable speed:

(1) release the child to his parents, guardian, or custodian and issue verbal counsel or warning as may be appropriate;

(2) release the child to his parents, guardian, or custodian upon their promise to bring the child before the court when requested by the court, unless his placement in detention or shelter care appears required as provided in Section 20; or

(3) bring the child to the intake office of probation services or deliver the child to a place of detention or shelter care designated by the court or to a medical facility if the child is believed to be suffering from a serious physical condition or illness which requires either prompt treatment or prompt diagnosis for evidentiary purposes, and promptly give written notice thereof, together with a statement of the reason for taking the child into custody, to a parent, guardian, or other custodian and to the court.

Any questioning of the child necessary to comply with subsection (a) (2) shall conform to the place, procedures and conditions prescribed by this Act and rules of court pursuant thereto.

(b) When a child is delivered to the intake office of probation services or to a place of detention or shelter care designated by the court, an intake officer of probation services shall, prior to admitting the child for care, review the need for detention or shelter care and shall release the child unless detention or shelter care is required under Section 20 or has been ordered by the court pursuant to Section 15.

(c) If a parent, guardian, or other custodian fails, when requested, to bring the child before the court as provided in subsection (a) (2), the court may issue its warrant directing that the child be taken into custody and brought before the court.

COMMENT

This section is similar to the one in the Uniform Act. It provides that a child whose situation falls within the provisions of Section 20 shall be brought to the intake office of probation services or delivered to a place of detention or shelter care designated by the court. Some questioning of the child is obviously necessary to determine whether the criteria set forth in Section 20 exist. This inquiry shall conform to the place, procedures and conditions prescribed by the Act and Rules of Court. It also requires that the intake office of probation services review the need for detention or shelter care *prior* to admitting the child for care.

SECTION 22. Place of Detention or Shelter.

(a) A child alleged to be delinquent or in need of supervision may be detained, pending court hearing, in the following places:

(1) a licensed foster home or a home otherwise authorized by law to provide such care;

(2) a facility operated by a licensed child welfare agency;

(3) a detention home for children alleged to be delinquent or in need of supervision provided for in Section 19; or

(4) any other suitable place designated by the court subject to the provisions of Section 19 of this Act, provided that no

place of detention or shelter care may be designated if it is a facility to which children adjudicated delinquent or in need of supervision may be committed under this Act.

(b) A child may be detained in a jail or other facility for the detention of adults only if the facility in subsection (a) (3) is unavailable; the detention is in a room separate and removed from those adults; adequate supervision is provided; the facility is approved under the provisions of Section 19; and the court finds that public safety and protection reasonably require such detention. The use of a jail or other facility for the detention of adults may not continue beyond (). (539)

(c) The official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime shall inform the court immediately when a child, who is or appears to be under the age of 18 years, is received at the facility, and shall deliver him to the court upon request, or transfer him to a detention facility designated by the court.

(d) When a case is transferred to another court for criminal prosecution, the child shall be transferred to the appropriate officer or detention facility in accordance with the law governing the detention of such person charged with a crime.

(e) A child alleged to be neglected may be detained or placed in facilities for shelter care enumerated in subsections (a) (1), (a) (2), and (a) (4), and shall not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses or for children alleged to be delinquent.

COMMENT

This section places protections around the use of detention and prohibits jail detention of any kind where a detention home for children is available. It also prohibits the placing of neglected children in a facility with delinquent children or children in need of supervision or in detention facilities for adults. It also prohibits the detaining of delinquent children in institutions for the long-time treatment of children adjudicated to be

delinquent. In order to expedite the development of a statewide program, the use of a jail or other facility for the detention of adults should be prohibited after a certain date timed so as to give the State agency sufficient time to establish appropriate facilities.

SECTION 23. Release from Detention or Shelter Care
—Hearing—Conditions of Release.

(a) When a child is not released as provided in Section 21:

(1) a petition shall be filed within 24 hours, excluding Sundays and legal holidays; and

(2) a detention or shelter care hearing shall be held within 24 hours (~~excluding~~ Sundays and legal holiday) from the time of filing the petition to determine whether continued detention or shelter care is required pursuant to Section 20.

(b) Notice of the detention or shelter care hearing, either oral or written, stating the time, place, and purpose of the hearing shall be given to the parent, guardian, or custodian if they can be found and to the child if delinquency or need of supervision is alleged.

(c) At the commencement of the detention or shelter care hearing, the judge shall advise the parties of the right to counsel provided in Section 25, and shall appoint counsel as required. The parties shall be informed of the child's right to remain silent with respect to any allegation of delinquency or need of supervision. They shall also be informed of the contents of the petition, and shall be given an opportunity to admit or deny the petition's allegations.

(d) When the judge finds that a child's full-time detention or shelter care is not required, the court shall order his release, and in so doing, may impose one or more of the following conditions singly or in combination:

(1) place the child in the custody of a parent, guardian, or custodian under their supervision, or under the supervision of an organization agreeing to supervise him;

(2) place restrictions on the child's travel, association, or place of abode during the period of his release; or

(3) impose any other condition deemed reasonably necessary and consistent with the criteria for detaining children specified in Section 20, including a condition requiring that the child return to custody as required.

(e) An order releasing a child on any conditions specified in this section may at any time be amended to impose additional or different conditions of release or to return the child to custody for failure to conform to the conditions originally imposed.

(f) All relevant and material evidence helpful in determining the need for detention or shelter care may be admitted by the court even though not competent in a hearing on the petition.

(g) If the child is not released and a parent, guardian or other custodian has not been notified and did not appear or waive appearance at the hearing, upon his filing his affidavit stating these facts, the court shall rehear the matter without unnecessary delay.

COMMENT

This section differs significantly from both the Uniform Act and the Standard Act. It provides that if a child is not released, a petition shall be signed within 24 hours, excluding Sundays and holidays. This provision is based on the theory that if the situation is serious enough to detain the child, it will generally be found serious enough to require the signing of a petition. Whether the petition will actually be filed will be subject to final approval by the appropriate prosecuting official's office.

This section also requires a hearing on detention or shelter care be held forthwith upon the filing of the petition. If the child's situation does not fall within the criteria provided for in Section 20, he must be released; however, the court may impose one or more of several conditions at the time of release." (540)

Enforcement services

Before examining proposals for the establishment of enforcement services in the Family Court, an attempt should be made to define the nature and extent of the problems presently encountered in attempts to enforce maintenance obligations. The problems associated with the enforcement of maintenance obligations are not confined by national boundaries and have been encountered in most, if not all, of the jurisdictions with which this writer is familiar.

The failure of the English legal system to ensure due discharge of maintenance obligations has been described by Mr. Justice Scarman, former Chairman of The Law Commission (England), who recommended that serious consideration should be given to the development of a State collection system substantially corresponding to that applying with respect to the payment and collection of income tax. Mr. Justice Scarman observed:

"English law...has, however, largely failed to answer the problem of support for the family when the wage-earner disappears. Some would say that the problem is not capable of answer: most men cannot afford two families. Nevertheless, it is a reproach to the law that its casualties are the mothers and children — those least able to look after themselves. ...It would be wrong to suggest that the blame here rests with the substantive law, though it does contain anomalies, inequities and minor injustices — for which I hope the Law Commission will in due course propose remedies. The root trouble is that the law's enforceability is pitifully inadequate when faced with the obstacles that a determined defaulting spouse can construct: his barricades are high and sturdy—they suffice, all too often, to

keep on the other side of the street the forces of law seeking justice for the family he has deserted.

When a man deserts his family, the wife will in most cases go first to the Magistrates' court for maintenance for herself and the children. She gets her order, only to find that she cannot get her money. The causes of her difficulty are two. One is economic—that most men cannot afford two establishments. Why, one might ask parenthetically, should divorce and re-marriage be made easy when the support of two families is beyond the means of most of us? The second is the weakness of the law when it has to be enforced against the disappearing or determinedly defaulting husband.

The failure of the law is dramatically illustrated by the following figures which I extract from Miss Margaret Wynn's valuable study of Fatherless Families [1964, at p. 63]:

Table 10 -- List of Nat. Ass. to Unsupported Wives, Mothers and Children, 1961

1961	£
Separated wives and mothers of dependent children received from N.A.B.	21,920,000
from husbands	2,375,000
N.A.B. from husbands	1,803,000
. from husbands	4,178,000
from Exchequer	20,117,000

If the wife is ultimately driven to the Divorce Court, her plight is barely, if at all, improved: for the defaulting husband now has recognized by law his opportunity to set up a second domestic establishment in competition with the first family for a share of his resources.

The law regulating divorce and the support of the victims of family breakdown may, I suggest, not unfairly be described in these terms: it is a law archaic in theory but twisted by ingenious devices into affording the relief of divorce in a great many but not all deserving instances: in its provision for the support of the broken family it is a law sound in approach (though I reserve my opinion as to its detailed provisions) but lacking effective power to enforce its decisions. How is one to approach the problem of its reform?...

I do not believe it can be cured by any reform of the matrimonial law as such. Something more far-reaching is required. The real difficulty is that the wage earner, usually the husband, can disappear. By the time he has been found and brought before the Court he can be on his way to his second disappearance. A determined defaulter will cause his wife and children endless misery, and more often than not imposes a great burden, through National Assistance, upon the community as a whole. It was hoped that the enactment of provisions enabling part of a man's earning to be earmarked by means of an attachment order for the support of his wife and children would go some way to meet this problem. Unfortunately it has not proved a very effective weapon. Employers dislike having to do the work and are inclined to find reasons for dismissing men against whose wages attachment orders have been made. Men dislike their employers knowing about their private affairs and have a habit of moving on to further work, even if not dismissed, so as to avoid at any rate for a considerable period of time another attachment order. I think the remedy must be more root and branch. We are almost alone amongst European countries in not maintaining a central register of our citizens. It is frequently said that for the Government to keep tabs on individuals, to make available upon the request of the wife or a

court information as to address and place of work, is an unwarrantable intrusion upon the right of private life and a danger to the liberty of the subject: though there has been some relaxation, it remains difficult to trace through state records the movements of a deserting husband. It is ironical that tenderness in this context for the right of privacy is not matched by any substantive rule in the law of tort protecting privacy. It may well have been true when society was less complex that ignorance of a man's whereabouts was the best guarantee of his personal liberty. But we now require other more subtle liberties, and one of them is the freedom of divorce. Society can allow the exercise of this freedom only if it can be satisfied that financial support for the vulnerable members of the family is assured. Such assurance requires not only an order of the court but, in the event of default, its enforcement. If a central register of addresses and places of work were kept and its information made available under proper safeguards to those who had rights to enforce, the difficulties of enforcing matrimonial orders would be largely met. There is much to commend the suggestion made by Miss Margaret Wynn in her book, that the Inland Revenue might be charged through the P.A.Y.E. system with the task of collecting what was due from a man for the support of his family, while the State assumed vis-a-vis the wife and children direct responsibility for their financial support. The exposed family would not then be bothered with problems of enforcement, and one of the great interests of society in family law would be on the way to being met, namely, the effective provision of support for mother and children." (541)

The high incidence of default in payments due under maintenance orders and the failure of the Canadian legal and judicial process to secure due compliance with orders of the court are described by Judge H.A. Allard in the following observations:

"The confusion of roles and philosophy is seen in the unwillingness or inability of the Courts to come to grips with a defaulting spouse who has without cause, *under existing definitions*, failed to comply with a maintenance order. The 1961 census of Canada lists 81,120 one-parent households with wives only at home. In Alberta a one-month sample in 1970 of those in receipt of public assistance indicated 8,204 were one-parent (mothers) families of a total of 27,859 families in receipt of aid. The Dominion Bureau of Statistics reports imprisonment as a penalty in enforcement proceedings under Deserted Wives' and Children's Maintenance Act actions in the years 1966 and 1967 as 77 cases and 123 cases respectively. The Dominion Bureau of Statistics reports in 1967: 7,925 total proceedings under the Deserted Wives' and Children's Maintenance provisions. The number of these being enforcement proceedings is unknown but analysis of Calgary Family Court records for 1969 show enforcement actions to be over 80 percent of the total Family Court applications. In the same court for the same period in spite of enforcement services 85 percent of all orders were in default to some degree and 50 percent of the cases in default in a very substantial amount in proportion to the total sums due. These figures do not negate the fact that large sums are collected; for example, nearly one-half million dollars in Calgary in 1969. Obviously by choice of the parties, many family-support complaints are not heard in any court. Many men cannot do more than meet existence needs for themselves and are therefore not subject to maintenance proceedings. Even with a minimal examination of the above figures one can only conclude that traditional maintenance concepts and court procedures are not a solution. My estimate is that there are in Canada at a minimum 80,000 families not being maintained by the responsible spouse. Imprisoning in one year 77 persons out of 6,500 (estimated) who appeared in court as a result of default in meeting maintenance orders is obviously an avoidance of imposition of penalties. Other measures are no more effective. The 1967 Bureau of Statistics reports 2,166 cases under the provision of s. 186 of the Criminal Code of Canada dealing with non-support, of which 577 were imprisoned." (542)

A more detailed analysis of the inadequacies of the existing law and procedures regulating the discharge of maintenance obligations was undertaken by the Ontario Family Law Project and led to proposals for the establishment of specialized services in the Family Court to assess and enforce maintenance rights and obligations. The relevant report stated:

"The Present System

The legal characteristics of the present system of maintenance orders, and related matters, have already been discussed in the Family Law Study, and in particular in earlier chapters of this volume. One general purpose of enforcing maintenance obligations is to make available finance for the reasonable support of spouses and children in various circumstances. Viewed thus narrowly, there are certain questions which can be asked about the efficiency of the present system of enforcement of maintenance orders, namely:

- (i) Does the system provide a reasonable level of financial support for those who are intended to be its beneficiaries?
- (ii) Are the payments prescribed under the orders being met?
- (iii) How is the income of the family being provided and apportioned between (a) spouses and parents and (b) the public purse (e.g. welfare)?
- (iv) What are the collection costs? In this connection there are a variety of possible overheads which would have to be taken into account in a strict costing, e.g., a proportion of the costs of running the family courts and the Department of Social and Family Services, and Municipal Welfare Departments. The indications are that collection costs can be substantial and in some instances may even approach or exceed the amounts collected.

Viewed more widely, maintenance is usually one element only in a marital breakdown situation or in a problem regarding the rearing of a child - e.g. a child in an institution, a child in a foster home, an illegitimate child.

In this whole area, there has been a considerable lack of empirical research and background data. In consequence, a research project on the social effects of maintenance judgments in family law was established in 1968 in Ontario and Quebec with the support of the Vanier Institute of the Family. The broad purpose of that project is to investigate some of the practical questions concerned with the enforcement of maintenance orders to try to ascertain the magnitude of the problems; the distribution of cases over the various categories concerned; the extent to which enforcement is proving a successful procedure under the present system; and the extent to which welfare and public services are already involved. ...[The] work of the project so far permits some tentative general impressions, which are as follows:

- (1) That the present system provides neither adequate nor secure financing for its intended beneficiaries. There is a 'missing' husbands' unit in Ontario operated jointly by the Department of Social and Family Services, and the Metropolitan Toronto Welfare Department and it appears that this unit is able to find about forty percent of the persons referred to it.
- (2) That where collection through the courts exists, it does not provide a reliable record of the total payments. The court is not a party to the judgment and payment through the court is not mandatory in law. So there is nothing to prevent direct payments by the husband or father, and the court may not be aware of these.
- (3) That the system appears to be expensive in terms of total collection costs and perhaps more expensive to the public purse than the average tax-payer suspects.

- (4) That the reciprocal enforcement procedures tend to be complicated technically, and expensive in administrative time and work, having regard to the sums collected.
- (5) That the court's enforcement procedures are often tantamount to a qualification for welfare, since the Department of Social and Family Services requires that a deserted wife should bring court proceedings as a prerequisite for welfare.

Proposed Functions of the Assessment Branch

The system for the enforcement of maintenance obligations, which is recommended in the present chapter, can be explained by describing the suggested functions of the Assessment Branch in the Provincial Family Court System, which has been proposed by the Family Law Study.

The main objective of a new system for the enforcement of maintenance obligations should be to place the Provincial Family Court system in a position to deal in a unified way with the various aspects of marital breakdown and parent and child questions, which can reasonably concern a court system. This approach avoids the fractionalising of problems and also the frustrating and inefficient process of referring people from one department or institution to another. Applying this general principle to the question of maintenance, it is recommended that the Assessment Branch should undertake the following functions:

(a) Maintenance assessments

Maintenance assessments may be made by the Assessment Branch on an application to the Family Court by:

- (i) Any person normally resident in Ontario having the custody of a child (under a minimum age to be determined by the Age of Majority Project) or any spouse normally resident in Ontario.
- (ii) The Department of Social and Family Services or any Municipal Welfare Department in the Province.

- (iii) The Department of the Attorney General of Ontario (e.g. reference reciprocal enforcement).
- (iv) A judge of the proposed Provincial Family Court System.
- (v) Any children's aid society in Ontario.

On such an application being made, the Assessment Branch, after inquiring into the relevant circumstances (e.g. income of applicant, income of parent or spouse, family standard of living, custody of children, whether on welfare) will assess the amount of maintenance to be paid by periodical payments to or by the applicant or other person with relation to whom the application is made (referred to for brevity in this chapter as the 'assessee'). The Branch will at the same time assess what maintenance, if any, should be paid by a spouse or parent of the assessee. The Branch will also assess what income or additional income, if any, the assessee other than a dependent child requires to cover minimum living requirements for himself or herself. In doing so, the Branch will take into account any income of the assessee and any welfare payments already being made.

An assessment to the effect that the assessee, or a spouse or parent of the assessee, should pay maintenance will be referred to for brevity in this chapter as a 'positive assessment' on that person.

An assessment to the effect that the assessee other than a dependent child requires a certain amount of income or additional income to provide minimum living requirements for himself or herself will be referred to in this chapter as a 'negative assessment'. There can also be a 'negative assessment' in respect of a dependent child.

It is recommended that in making a negative assessment in respect of a dependent child, the Assessment Branch and the Family Court system will take as their guiding principle a level of maintenance that will provide the child with a good standard of financial support, such as can be of real assistance in minimizing handicaps in his or her circumstances, such as illegitimate birth, or separated parents. This level will, of course, be different from the 'minimum living requirements' on which a negative assessment in respect of a person other than a dependent child is based.

The court may provide, and the Assessment Branch can so recommend to the judge, that conditions will be attached to the mode of payment of the assessment in respect of a dependent child, to ensure that the payments are used for the benefit of the child (such as supervision of the payments by the Assessment Branch).

(b) Payment of negative assessments

The Branch will pay the amount of any negative assessment to the assessee (or the proper person on his or her behalf) by periodical payments.

In case of emergency need, the Branch may make emergency payments in advance of an assessment being determined.

If the Branch makes a payment on a negative assessment or makes an emergency payment, it may then 'stand in the shoes' of the beneficiary and claim welfare in respect of such beneficiary (or other relevant benefits or assistance) from the appropriate Welfare Department, up to the amount of the actual payments made by the Branch on the negative assessment or any emergency payments.

(c) Positive assessments

When the Branch has made a positive assessment, it will serve a notice of this assessment on the appropriate person, with a demand for payment to be made to the Branch by periodical payments.

In the event of non-payment after service of a notice of a positive assessment, the Branch may apply to a judge of the Family Court for a maintenance judgment. Such a judgment will give the Branch all the powers of enforcement and execution presently available to a plaintiff on an alimony judgment in the High Court in Ontario.

But it is recommended that imprisonment for non-payment of maintenance on a 'show cause' summons should be discontinued once the system of enforcement of maintenance orders proposed in this chapter comes into operation.

After the introduction of the proposed Provincial Family Court System, proceedings for the discretionary continuance of support obligations after the termination of a marriage should be heard in the Family Court, and it will be a function of the

Assessment Branch to assist the Family Court Judge in such cases by assessing the quantum of maintenance that should be paid and the frequency of the periodical payments. If a discretionary order is made by the judge, it will then be operated by the Assessment Branch as for a positive assessment.

There may be occasions when a claimant or beneficiary will feel that the Assessment Branch is not doing all that might be done to recover on an assessment.

It is recommended, therefore, that a claimant or beneficiary should be entitled, with leave of a judge of the Family Court, to bring proceedings in the Family Court in his or her own name for the amount due on an assessment. If an order is made on such proceedings:

- (a) It should be made in the name of the claimant or beneficiary and permit enforcement of the order or execution as in respect of an action of alimony in the High Court under the present law.
- (b) It should provide that the payments will be made in all cases to the Assessment Branch, which must then account to the claimant or beneficiary for what is due to him or her.

When the system for the enforcement of support obligations which is proposed in this chapter has been introduced, it is recommended that actions for alimony in the High Court, actions for maintenance under the Deserted Wives' and Children's Maintenance Act, and all other proceedings for maintenance of a spouse or child/children (except, of course, proceedings under the system proposed in this chapter) should be discontinued.

Any person on whom a positive assessment is served should be able to appeal against the assessment to a judge of the Family Court on one or more of the following grounds:

- (i) The quantum of the assessment. On appeal the judge may cancel, reduce, increase or otherwise vary the terms of the assessment.
- (ii) That the assessee is not liable at all in respect of the maintenance obligation in question, because:
 - (A) paternity or maternity is denied;
 - (B) the subsistence of the marriage is denied;
 - (C) there has been cruelty, desertion or adultery by his or her spouse and it is in respect of the support of such spouse that the positive assessment has been served on the appellant. Even if the Family Court judge finds the cruelty, desertion or adultery to be proved, it is recommended that the judge should still have a discretion to take into account the conduct of the parties and to confirm or vary the assessment.

It is recommended that the Assessment Branch should have power to negotiate a lump sum settlement in lieu of periodical payments.

Under Part III of the present Child Welfare Act, a children's aid society can enter into a tripartite contract regarding an illegitimate child, with the mother of the child and the putative father.

It is recommended that this provision should be continued. Consequently, if there is such a contract, the enforcement of the support obligation will not come under the Assessment Branch of the Family Court unless an application for an assessment has been made. This will usually happen if the payments are not kept up under the contract, the application being made by the children's aid society or by the mother.

(d) Reciprocal enforcement

Under the system proposed in this chapter, procedures for enforcement of a support obligation outside Ontario will be commenced by the making of a provisional assessment by

the Assessment Branch, if it is intended to enforce this assessment reciprocally outside the Province. The Assessment Branch will then apply to a judge of the Ontario Family Court System for a provisional maintenance judgment. The Assessment Branch should be empowered to transfer that judgment outside the Province, subject to the provisions of the applicable reciprocal enforcement legislation.

(e) Collections and payments

Under the system proposed in this chapter, the Assessment Branch will be paying out money on negative assessments and emergency payments, and will be collecting money on positive assessments. When the Branch receives a payment on a positive assessment, it will in the first place recoup itself as far as possible in respect of payments on negative assessments to the same assessee. If, after this has been done, there is a surplus, that surplus will be paid over to the beneficiary of the assessment. The Family Law Project has no recommendations to make as to whether any commission or collection fee should be charged by the Assessment Branch against surpluses paid over to assessees. It is suggested, however, that in the first instance, the surpluses should be paid with no deduction of commission or collection charges, and that after the system has been working for some time, the position should be reviewed as to whether commission or collection charges should be introduced. There should be statutory power to introduce commission or collection charges by regulations.

(f) Information

Provision should be made to empower the Assessment Branch to obtain the information which it may require in order to make assessments. On obtaining a judge's order, therefore, the Assessment Branch should be able to require confidential returns as to income and other relevant information from an assessee or the spouse, parent or child of an assessee, and on a judge's order, should be enabled to require an assessee or other relevant person to attend at the Assessment Branch, or before a judge as the case may be, in order to answer questions, produce information, and the like.

Organization of the Assessment Branch

The Family Law Project has no detailed recommendations to make in regard to the organization, personnel, office procedures and the like of the Assessment Branch. These are matters that would be better considered at a later time (if the recommendations of the Project are accepted) as part of the work of setting up the proposed Provincial Family Court System. Three general observations can be made, however:

- (i) The organization of the Assessment Branch may vary considerably having regard to the size of the court centre that is involved. Indeed in smaller centres the volume of work may not justify the setting up of a special branch or department, and ad hoc arrangements may be made consistent with economy and efficiency.
- (ii) A close liaison will be required:
 - (a) between the Assessment Branch and other departments of the Provincial Family Court System; and (b) between the Assessment Branch and the Department of Social and Family Services, and Municipal Welfare Departments. Such liaison will be particularly necessary in regard to: (1) work on negative assessments and emergency payments; and (2) the tracing of missing assessees. Also there ought to be a co-relation of practice, standards and the like between the Assessment Branch, dealing with negative payments and emergency payments, and the Department of Family and Social Services and Municipal Welfare Departments, dealing with welfare payments. This does not mean that a negative assessment, in respect of a person other than a dependent child, should always be at the welfare level, but it should not be below the welfare level.
- (iii) The organization, administrative practices, equipment etc., of the Assessment Branch should be in line with the best modern standards of business efficiency.

But the Branch should combine a high level of speed and accuracy with very considerate and human treatment of the members of families with whom it has to deal.

An Example

It may be helpful to an understanding of the system of enforcement of support obligations outlined above, to show its working in a typical fact situation.

Mr. Grasshopper has deserted Mrs. Grasshopper, leaving her with two small children. Mr. Grasshopper is providing no money. Mrs. Grasshopper is resident in Ontario, she is not employed, and has no source of income.

Mrs. Grasshopper can make an application to the Assessment Branch both because she is a spouse and also because she has custody of two children below the minimum age. On receipt of the application, the Assessment Branch can immediately make an emergency payment to Mrs. Grasshopper. The Assessment Branch will next enquire into the circumstances of Mrs. Grasshopper, taking into account that she has custody of the two young children. It may also obtain a judge's order and require information from Mr. Grasshopper. It may be, of course, that the Branch will be able to obtain this information without the necessity of a judge's order if Mr. Grasshopper is prepared to supply the information voluntarily, and if he appears truthful and to be giving information that is consistent with that given by Mrs. Grasshopper. When the Assessment Branch has obtained the information that they require, they will make assessments in respect of Mr. Grasshopper and Mrs. Grasshopper. The assessments in respect to Mrs. Grasshopper and the two children will clearly be negative assessments. Having made the negative assessments, the Assessment Branch will pay them in periodical payments to Mrs. Grasshopper.

Let us assume that the assessment on Mr. Grasshopper is a positive assessment. The Branch will serve notice of the positive assessment on Mr. Grasshopper. If Mr. Grasshopper pays up, and the amount of the positive assessment is not greater than the negative assessments for Mrs. Grasshopper,

then the Assessment Branch will simply recoup itself out of the payments on the positive assessment for the payments which they have made on the negative assessments. The Assessment Branch, having paid on the negative assessments, can then submit an application for welfare in respect of Mrs. Grasshopper. If the Branch then also receives payment on the positive assessment from Mr. Grasshopper, it will, of course, have to refund to the Welfare Department up to the amount of the welfare already paid by that Department to the Assessment Branch. None of these pieces of accounting, however, concern Mrs. Grasshopper, who will be receiving her money regularly from the Assessment Branch up to the amount of the negative assessments. The adjustments between the Assessment Branch and the Welfare Department will not concern Mr. Grasshopper either. His obligation is simply to pay the amount of the positive assessment to the Assessment Branch. In calculating the amount of Mr. Grasshopper's income and financial resources, the Assessment Branch will not count in any welfare that Mr. Grasshopper may be receiving. In the case of Mrs. Grasshopper, in calculating the amount of the negative assessments for herself and the two children, the Assessment Branch will take into account any welfare that she is already receiving. In the present example, it is assumed that neither Mr. nor Mrs. Grasshopper were on welfare when Mr. Grasshopper deserted Mrs. Grasshopper.

If the amount of the positive assessment on Mr. Grasshopper exceeds the negative assessments in respect of Mrs. Grasshopper, the Assessment Branch will pay over the surplus to Mrs. Grasshopper if and when the surplus is received from Mr. Grasshopper. On the other hand, the amount of the negative assessments are paid automatically and are independent of whether Mr. Grasshopper pays his positive assessment or not. If Mr. Grasshopper therefore disappears and fails to pay his positive assessment, Mrs. Grasshopper will receive the amount of the negative assessments and nothing else.

If Mr. Grasshopper fails to meet his positive assessment, the Assessment Branch can obtain an order from a Family Court judge and enforce that

judgment on the same basis as the plaintiff in an alimony action in the High Court.

If Mr. Grasshopper objects to the amount of the positive assessment or if he considers that he has a ground which exempts him from supporting Mrs. Grasshopper at all, or from supporting one or other of the children, then he can appeal to a judge of the Family Court to have these matters determined by court proceedings.

If Mr. Grasshopper moves to another province, this will not change the position of Mrs. Grasshopper (except that perhaps it may lessen her chances of obtaining any surplus that may be available), but the Assessment Branch can obtain a judge's order and initiate proceedings for reciprocal enforcement.

In this example, the parties remain legally married throughout. If there is a divorce, then the discretionary continuation of Mr. Grasshopper's support liability for Mrs. Grasshopper, beyond the termination of the marriage, will be decided by the court as part of the divorce action. The function of the Assessment Branch in this respect will be to assist the judge by reporting on the financial situation of the parties and helping him by supplying information for the exercise of his judicial discretion, and, if an order is made, by applying the order as a positive assessment.

Concluding Observations

If the recommendations of this chapter are implemented, the result should be a system under which parents and spouses who need financial support will be paid promptly, at least up to a reasonable minimum standard of living, and where, when they make application to the Family Court, the whole problem of assessment and payment will be dealt with by an organ of that court. This is concentrating, however, on the financial aspects. The typical situations are the breakdown of a marriage, or one parent with custody of a young child or children. The law on maintenance obligations, together with the law on welfare, is intended to create a source of money for these cases, the money coming from either the other spouse or parent, or from the public purse. The

other spouse is the other half of a relationship that has broken down, and an unsatisfactory relationship is likely to exist in regard to another parent. Welfare is something that people usually do not wish to take unless they are compelled by circumstances. On all these counts, maintenance payments and welfare payments can be a valuable temporary aid in a marriage breakdown, for a young illegitimate child in the custody of its mother, or other difficult situations, but they are not a desirable permanent arrangement, except in very special circumstances. The reason why they are bad on a permanent basis is because, by these arrangements, the spouse or parent becomes financially dependent on another spouse or parent with whom relations have disintegrated, or is dependent on welfare.

The preferable alternative to maintenance and welfare is to achieve a situation where the spouse or parent becomes self-supporting and financially independent. There can be difficulties in doing this, for example:

(a) A mother with custody of young children will have to look after them herself or arrange for their care while she is working. The present situation as to day-care arrangements has already been commented on in the Family Law Study.

(b) A wife may have been out of employment for some time before the marriage breakdown or may never have been employed. So there may be a need for training and guidance for satisfactory employment, together with interim financial help, and also the making of arrangements for the care of young children. The married woman who is deserted by her husband and has young children in her custody does not have the employment potential or employment mobility of a single person, and recognition of this obvious fact is the root of the problems with which this chapter is concerned. Realistic assistance from the community and public services is needed to overcome the inherent handicaps.

With these considerations in mind, the following general recommendations are made:

(A) That special efforts should be made by the Department of Social and Family Services to promote greater availability of day-care facilities for children. The cost of these should be within the income ranges of working mothers bringing up children on their own, and should be conveniently located.

(B) That the Department of Social and Family Services should establish a special Consultation Bureau for spouses and parents who have been receiving maintenance payments from the Family Court (whether on negative or positive assessments) for a prescribed length of time. The spouses and parents would be referred to the Bureau by the Family Court, and it would be the function of the Bureau to give advice and assistance designed (where this is appropriate and possible) to help the person to become employed and financially independent, to receive training in suitable cases, and at the same time (if a parent) to make proper arrangements regarding the care and upbringing of dependent children. The Bureau would work in close liaison with the Assessment Branch and also with the counselling services to the proposed Family Court System.

(C) All assessments by the Assessment Branch should be reviewed by the Branch at prescribed intervals and a re-assessment made. Such re-assessment should be made after discussion with the Consultation Bureau, and also with the Counselling Services of the Family Court System, if they have been concerned with the case." (543)

A less ambitious proposal than that formulated by the Ontario Family Law Project was endorsed by the Civil Code Revision Office in its Working Paper on the Establishment of a Family Court in Quebec. Recommendations 47, 48 and 49 of that Working Paper provided as follows:

"RECOMMENDATION #47:

THE COMMITTEE RECOMMENDS THAT A COLLECTION SERVICE BE ESTABLISHED TO COLLECT, WHERE THE PERSON OWING MAINTENANCE IS IN DEFAULT, THE SUMS DUE UNDER A MAINTENANCE ORDER AND TO REMIT THEM TO THE PERSON TO WHOM THE MAINTENANCE IS OWED.

RECOMMENDATION #48:

THE COMMITTEE RECOMMENDS
THAT THE GOVERNMENT BE
SUBROGATED IN THE RIGHTS OF
THE PERSON TO WHOM MAINTENANCE
IS OWED.

RECOMMENDATION #49:

THE COMMITTEE RECOMMENDS THAT
WHERE THE PERSON OWING MAINTENANCE
IS IN DEFAULT TO PAY, THE PERSON
TO WHOM MAINTENANCE IS OWED BE
PAID THE ALLOWANCE HE WOULD BE
ENTITLED TO ACCORDING TO THE
STANDARDS PROVIDED BY THE SOCIAL
AID ACT, S.Q. 1969, c. 63."(544)

The more modest proposals endorsed by the Civil Code Revision Office, which relate substantially to the enforcement of maintenance orders in default and do not purport to establish new procedures for assessment of maintenance on an original application, appear to be capable of effective implementation throughout Canada without undue imposition of stress or strain upon the existing legal and judicial process, but the more ambitious proposal formulated by the Ontario Family Law Project raises fundamental questions as to the extent to which the Family Court should develop programmes and procedures that will supersede, in part at least, the role of existing welfare agencies. (545)

At a meeting of the Canadian provincial and federal law reform bodies, held in Edmonton on June 26-27, 1972, the following proposal received unanimous approval:

"There must be available to the Family Court and to persons appearing before it certain 'supporting services', the precise nature of which may vary but which may be described in general terms as follows:

- ... (3) Investigative services to make available to the court in appropriate cases a source of facts relating to the family;
- ... (5) Enforcement services to see to the collection of money payable under maintenance orders, with appropriate administrative facilities and legal mechanisms and procedures..." (546)

The conclusions expressed in paragraphs 3 and 5, supra, appear to envisage that the investigative services might discharge a role in assisting the court to determine the quantum of maintenance and that the enforcement services should assume the responsibility for ensuring due compliance with any maintenance order that has been granted. (547)

Clearly, the respective roles of the investigative and enforcement services must not be unduly compartmentalized and a high degree of cooperation between these services must be established in order to avoid conflicts of jurisdiction or duplication of effort. Two examples might be cited to indicate the need for effective cooperation and coordination between the investigative and enforcement services. The first relates to the problem of tracing a missing spouse or parent who seeks to evade his or her maintenance obligations. Such a spouse or parent may disappear before an order for maintenance is sought or after such an order has been granted and is in default. Jurisdictional problems respecting the roles of the investigative and enforcement services in such contexts as this must be avoided. Secondly, if a

maintenance order is in default, it may be necessary to "investigate" in order to determine whether the order should be "enforced" or whether variation of the order is warranted by the circumstances of the particular case. The need for effective cooperation between the investigative and enforcement services in these circumstances is also self-evident. Effective cooperation and lines of communication must also be established between the enforcement services on the one hand and the administrative (including accounting) services and legal services on the other. (548) It is not envisaged that difficulties should arise with respect to the internal procedures of the Family Court that are developed to promote coordination and cooperation between the respective auxiliary services in the court.

In devising procedures to promote the observance and enforcement of maintenance obligations, guidance based upon experience may be secured from a close examination of procedures operating in the State of Michigan, which may be usefully compared with the proposed procedures formulated by the Ontario Family Law Project. (549) Commenting on the procedures operating in the State of Michigan, Dean L. Neville Brown of the University of Birmingham, England, has observed:

"A support order is of little value if there is no adequate machinery for its enforcement and the collection of payments. Of the many administrative devices to ensure payment, two institutions are selected for mention here, both of which originated in the City of Detroit in the State of Michigan. They are (i) the Adjustment Division attached to the Recorder's Court and (ii) the Friend of the Court attached to the Circuit Court.

- (i) *Adjustment Division of the Department of Probation of the Recorder's Court in Detroit*

The Recorder's Court of the City of Detroit has exclusive jurisdiction of criminal cases in that city. Until 1952 the function of the Adjustment Division of the court's Probation Department was the routine issuing of warrants against a husband upon the wife's complaint of non-support. In that year, however, the appointment of a new and energetic supervisor of the Division started a far-reaching development in the use of the office as a means of 'adjusting' the relationship between the spouses and settling their difference without recourse to court proceedings or criminal sanctions. Today the office is widely respected in the community it serves, with a reputation for dealing fairly with both husband and wife and helping them to resolve their support problems.

The Division is mainly concerned with the lower economic level of the population, a large proportion of whom are coloured. Generally of limited education and intelligence, many are said to need 'someone to tell them what to do,' and the attitude of the staff of the Division is avowedly paternalistic.

The Division will take no action whilst a couple are still living together. Where a separation has occurred, the Division will only intervene if either there are young children of the marriage in the wife's care or the wife herself is too old or too sick to work. In other words, no action will be taken merely because a husband has left without support an able-bodied, childless wife: in such a case, the Division will not issue a warrant for non-support, and the wife is left to make shift for herself by finding work--or, not infrequently, another man to support her. If she seeks public assistance, the assistance authority usually refer her back to the Division for recourse to be made against her husband. In practice, there is a close liaison between the Division and the Detroit public assistance authorities; frequently, payments made by the husband to the Division are immediately remitted to the assistance authority to reimburse payments which it has made to the wife under the Aid to Dependent Children or other social welfare programmes.

The procedure followed by the Division is a simple one. If it decides to act on the wife's

complaint, it writes to the husband in the name of the judge of the Recorder's Court, requiring him to attend at the court building. This is usually enough to secure his attendance, but if he does not attend, he will be brought in on a warrant to arrest. In the court office the husband and wife are interviewed together. Some reconciliations are achieved at this stage, but in general there is no attempt at marriage counselling, although a very few of the most hopeful-looking cases are screened out for reference either to the psychiatric clinic attached to the Recorder's Court or to the marriage counsellors in the office of the Friend of the Court.

The main object of the joint interview is to fix a sum for support commensurate with the wife's need and the husband's means. When this sum has been agreed, the husband is often persuaded to make a regular assignment from his pay cheque. Detroit employers have proved willing co-operators in paying such assignments directly to the Division; they also co-operate in supplying details of wages whenever the Division doubts the accuracy of the figures which the husband volunteers at the interview. There is no legal obligation upon employers to carry out employees' assignments nor to supply wage figures, but they do both, presumably motivated in part by a sense of public duty and in part by self-interest: they stand to lose the services of an employee if he is imprisoned for non-support of his dependants.

If all goes well, payments are regularly received each week by the Division, which makes a corresponding payment to the wife. Unlike the Friend of the Court, the Division gives its services without charge to either spouse.

The procedure described is only available where the wife is living in the City of Detroit and the husband anywhere in the State of Michigan. Where the husband resides in another state, the case must be referred to the prosecuting attorney for him to initiate normal proceedings under the reciprocal enforcement legislation.

If this 'adjustment' procedure is unsuccessful, that is if the husband refuses to co-operate in agreeing to a support payment or later falls down

on the agreed payments, then upon the wife's complaint the Division issues a warrant for the misdemeanour of non-support. The husband is prosecuted before the Domestic Relations Division of the Recorder's Court, and usually an order for probation is made, conditioned upon the keeping up of his payments. It is a tribute to the adjustment procedure that only about one case in a hundred reaches the stage of warrant and probation: the Division prides itself on keeping cases out of court. The volume of business which the Division handles is very great: on the average it receives 500 new cases each month.

It will be seen that what was originally a court office for the receipt of complaints and the issuing of warrants as a matter of routine has transformed itself into what may be regarded as a public agency for social casework. The legal peg for its activities is the fact that non-support is a crime of which the Recorder's Court takes cognisance. The procedure of 'adjustment' is drawn into advising both spouses on budgeting problems generally: it is quite common, in this connection, for heavily indebted parties to be referred to a reputable private agency which specialises in 'credit adjustment.' Significantly, the eight probation officers of the Division who interview couples encourage the husband from the first interview to regard them not as officials but as 'workers.' Thus, the standard form of letter to a husband in arrears with support payments invites him 'to call and make arrangements with your *worker*' for paying the arrears. The casework relationship is perhaps assisted by the Division's formal link with the Department of Probation, a link which is underscored by the heading of all its official communications. It remains, however, a casework agency operating under the authority of the Recorder's Court and with the threat, implied if not expressed, of criminal sanctions in the background. As a technique for securing family support it is administrative rather than judicial in character, although carried on under the aegis of the court and by its officers.

(ii) *The Friend of the Court, Wayne County, Michigan*

With the Adjustment Division of the Recorder's Court in Detroit must be compared the 'Friend of the Court' for the Circuit Court of the County of Wayne. For both offices perform similar functions, although serving courts which are quite distinct in point of jurisdiction. The City of Detroit is wholly situated in Wayne County, the Circuit Court of which has jurisdiction in all civil cases involving \$100 or more and in all criminal cases outside the City of Detroit. As we have seen, criminal jurisdiction within the city belongs to the Recorder's Court.

The office of Friend of the Court was created in 1918, when the presiding judge of the Circuit Court appointed an attorney with experience in social work to assist in enforcing court orders for the support of divorced wives with dependent minor children. The officer was given the name 'Friend of the Court,' an americanising of *amicus curiae*. In the following year the state legislature gave its blessing to the experiment by authorising the appointment in every circuit of a Friend of the Court with the duties of enforcing payments for support and of supervising the care of minor children of divorced parents. Originally the Friend had to be a practising attorney and his appointment was by the prosecuting attorney for the circuit. At the present day, he is no longer required to be an attorney and his appointment is entrusted to the state governor after recommendation by the judges.

In the four decades of its existence the authority and responsibility of the office have grown steadily. The institution has been extensively imitated in other states, and in Michigan only a few sparsely populated counties are without a Friend. But the most remarkable growth is in its circuit of origin, Wayne County. Here the great metropolitan area of Detroit and its neighbourhood, with a population exceeding three millions, is served by a Friend whose staff numbers well over a hundred persons.

The functions of the Friend are laid down by the Wayne Circuit Court Rules in conjunction with

the statute of 1919 already mentioned. They cannot be exercised until an action for divorce, annulment or separation has been commenced by one of the parties. Before such a suit is filed, the problem of family support or other marital discord is the concern either of the Recorder's Court in its Adjustment or Domestic Relations Divisions or of other appropriate agencies. What the Friend's functions are will best be shown by describing the three-fold organisation of his office into the departments of investigation, enforcement and referees.

Assuming a suit for divorce has been filed, the work of the Investigation Department is succinctly described by the Friend as follows:

' It is the responsibility of this department to ascertain the factual situation of the parties, and to analyse and reduce this material to report form which is then submitted to the Circuit Court for use in conjunction with motions *pendente lite*. At this stage of the proceedings, time has always been recognised as of the essence because of the divers problems and emergencies involving minor children which arise upon the disorganisation of the family unit. In an effort to mitigate such circumstances as much as possible, the preparation of motions for temporary support has always been accorded priority. As a means of fulfilling this concept, a procedure for obtaining *ex parte* orders for support and custody of minor children was developed several years ago. This method permits the obtaining of an order for support simultaneously with the commencement of suit, where the exigencies of the case require immediate action. The amount of support which is determined by a fixed payment schedule is predicated upon the wife's affidavit setting forth the husband's earnings. The protection of due process is accorded to the husband under such proceedings, inasmuch as local court rules suspend the effectiveness of such orders until ten days after personal service upon the husband, and only then in the absence of his objections upon his behalf.'

Besides this report for the purpose of motions made pending suit, the Friend's office also prepares a 'final report' to place before the court at the actual trial of a divorce suit involving minor children. This report contains 'pertinent factual information with reference to the needs of the children, financial ability of the parties, contact of the family with other agencies, and a detailed description of the actual home environment of the children.' The filing of this report is mandatory before a decree can be granted, and experience shows that the court places considerable reliance upon its contents in deciding which parent shall have custody of the children and the amount of support awarded. In some cases the only practical solution is the assumption of custody and supervision of the children by the Friend at the direction of the court. In other cases the Friend assists the parties in arranging suitable board for the children. At all times the Friend concerns himself with the general welfare of minor children of divorced parents. Thus, the Friend may start juvenile court proceedings where a child is neglected or abandoned; he will supervise the exercise of visitation rights where these cause trouble and he will seek to smooth out the many difficulties that arise between divorced parents in regard to their children.

Under a statute of 1939 five referees are employed full time in the office of the Friend of the Court in dealing with references made to them from the Circuit Court.

Their main concern is with the disposition and division of the property of the spouses seeking divorce. Whenever a property settlement cannot be agreed between the spouses (or their attorneys), the referee holds hearings and receives testimony, on the basis of which he recommends to the trial judge how the matrimonial property should be distributed. Since it is the practice of the judge to accept the referee's recommendation, the spouses' attorneys usually reach agreement about a property settlement with the aid of the referee and without recourse to the judge. Frequently, the referee's inquiry into the financial interests of the parties raises additional problems concerning support for the children or alimony for the wife. These problems too will then be disposed of by the referee.

Enforcement Division. The volume of business handled by this Division is very large, as it handles all complaints of non-compliance with orders and decrees granted by the Circuit Court in regard to support and alimony. It was originally called 'the alimony complaint department.'

All complaints, whether by post or in person, are examined by a staff of trained investigators and attorneys, who decide what action is needed. Many complaints can be settled amicably by an interview between the investigating officer and the parties. Otherwise contempt proceedings may be instituted before a judge of the Circuit Court. Five execution officers are employed full time by the Friend of the Court to make arrests on writs of attachments issued by the court for non-payment for support.

A separate section of the Enforcement Division deals with the enforcement of orders made by the Circuit Court for Wayne County under the Uniform Reciprocal Enforcement of Support Law. Requests for proceedings in 'foreign' courts against out-of-state defaulters are forwarded to the prosecuting attorney's office for Wayne County.

Orders for support always require payments to be made directly to the Friend, not to the wife (or other beneficiary of the order). Husbands often choose to call at the cashier's department of the office on Friday afternoons (Friday being pay-day) as they are able to have their pay cheque cashed there without charge.

Except in paternity cases, there is no automatic check upon whether a man is in default in his payments. If one week the Friend receives no payment from a husband, then no corresponding payment is sent that week to the wife. This usually brings the wife post-haste to the office, and attention is drawn in this way to the husband's default. Upon the wife's complaint the machinery of enforcement is set in motion: warning letters, interviews, and in the last resort, a summons 'to show cause' why he should not be committed for contempt.

Unlike the Adjustment Division of the Recorder's Court, the Friend of the Court charges a fixed sum

of \$10 annually on each account to defray the administrative expenses. The practice is to debit the husband's account with this sum and to leave it to the wife to invoke the enforcement procedure for the deficit of a like amount in her alimony, if need arise." (550)

In the event that enforcement services are established in the Family Court, consideration must be given to the qualifications of the personnel. There appears to be a consensus of opinion that much of the responsibility for securing the enforcement of maintenance obligations should be assumed by trained para-professional personnel and that an enforcement role should not fall upon the professional counselling⁽⁵⁵¹⁾ or legal staff⁽⁵⁵²⁾ except in circumstances where their respective professional skills or advice are essential to effective resolution of the issue. Thus, the Report of the New Jersey Family Court Study Commission stated:

" A word must be said about the third non-judicial phase of a family court's function, the first two being intake and counseling. This third phase, the enforcement and/or follow-up phase, presently exists in New Jersey but only on an altogether too limited basis. Present probation departments appear to be so understaffed that they are able to function primarily as collection agencies in support matters, and this only to a limited degree. Insufficient emphasis is placed on professional follow-up services even in juvenile matters because of such limitations of resources. To the extent that trained, professional personnel are being used as collection officers, the present system results in a most unfortunate wasting of resources. Professionally trained personnel are not needed to perform this function. They should be freed to perform proper counselling and follow-up services in both juvenile and marital matters. The collection or enforcement function can be better, more efficiently and more economically

executed by non-professional, though properly trained, enforcement officers with the support of a modern, fully effective record-keeping and retrieval system. The establishment of a proper family court system might well involve a reassessment of the existing situation in this third phase with the possible results that a separation between the enforcement and follow-up functions would be instituted; that properly trained persons would be assigned to each; but that those assigned to the follow-up functions would possess professional credentials as well as proper training or experience." (553)

And in the U.S. Department of Health, Education and Welfare, Children's Bureau Publication on Standards for Juvenile and Family Courts, it is observed:

" As stated earlier, actions for support should be civil proceedings and the court's disposition should be limited to the specific issues; that is, an order for support. The sanction imposed for failure to comply with such an order would be the same as for contempt of court. Probation as applied to adults is a criminal sanction and should not be imposed in civil proceedings. It may, of course, be imposed as a result of a contempt action.

Even where support is a criminal or quasi-criminal action it should not be necessary to place the adult on probation merely for the collection of support. Not all support situations need such service. Often new families have been established and the adult may neither need nor desire such service. On the other hand, nonsupport in many cases is an indication of other problems in the family that may lead ultimately to a broken home. This may be prevented through casework service. Therefore, where nonsupport is a criminal proceeding, probation should be selectively used, based upon the need for such service as determined by the social factors in the situation.

When action for support is a civil proceeding, it should be possible to refer adults who need and desire casework service to an appropriate agency in the community.

In handling nonsupport cases, regardless of whether they are civil or criminal, provision should be made whereby the court can facilitate collections, keep adequate records of receipts and disbursements, promptly know when payments are delinquent, contact the person under order or his employer if necessary, and arrange for another hearing when needed. In the absence of problems indicating the need for other services, these routine functions do not necessarily require the services of a trained caseworker. In larger courts where the volume of nonsupport cases may be greater, these functions should be placed in a separate collections unit." (554)

The deployment of para-professional personnel to discharge the ministerial responsibilities of enforcing maintenance obligations has also been suggested by Elizabeth and Richard Dyson who refer to the use of such personnel in the New York City Office of Probation. They have observed:

" A second major area where supplementary staff can be useful is in the collection of support money. Probation officers may be used for that task, as is provided by rule of court pursuant to the [New York] Family Court Act. But some observers feel that the role of probation officers as mere 'collection agents' should be down-played, and that their primary function should be adjusting and counseling cases. Thus some courts have sought to create new positions for help in collecting money owed for support.

The New York City Office of Probation has established a new category of employee altogether, 'fiscal officers,' to relieve probation officers of the ministerial aspects of enforcing orders of support. Fiscal officers need only have a high school education and three years of investigating experience, or a college degree. Their function is to service cases of failure to comply

with support orders and entertain applications for modification of the amount of support. If problems of visitation, neglect or abuse arise in the course of processing such cases, fiscal officers are instructed to channel such cases to the probation officer..." (555)

Independent of the need to establish enforcement services or facilities in the Family Court is a need to examine and reform the law regulating the diverse remedies that can be invoked in attempts to secure due compliance with maintenance obligations. (556) This subject matter falls outside the terms of reference of this paper and will be examined in a separate study of maintenance rights and obligations undertaken by the Family Law Project.

THE STATUS AND STRUCTURE OF THE FAMILY COURT

If specially constituted Family Courts are to be established to exercise a comprehensive jurisdiction over matrimonial, familial and juvenile proceedings, it is necessary to determine the place of such courts in the judicial system.

The consensus of opinion suggests that Family Courts should not be established as a separate entity in the judicial system but as part of the existing judicial structure and that the ideal is not a special tribunal but specially trained judges in a unified court system. Thus, Dean Pound has observed:

"The place of a family court...is no less a serious question than whether there should be such a court. For the time for new courts, self-sufficient and independent, contending for jurisdiction, has gone by. ... The advantages of unified treatment of family troubles is manifest. But, where separate courts with exclusive jurisdiction of particular classifications are set up, sharply drawn jurisdictional lines are the result. These are not always easy to draw well in advance of experience. Specialist judges for particular phases of the situation requiring their specialized knowledge and experience ought to be made available in a unified proceeding in a unified tribunal to help in the solution of specialized problems in what is still one proceeding." (557)

The views expressed by Dean Pound were endorsed by Judge Paul W. Alexander, a leading advocate of the concept of unified Family Courts, who stated:

"I am in complete agreement with Professor Haurd (and incidentally we are both in agreement with Roscoe Pound) in (1) opposing the rotation of judges and (2) advocating that the family court be not a separate court

but a department of the court of first instance of general jurisdiction, and (3) that the jurisdiction of the juvenile court be integrated with that department." (558)

The issue of whether the Family Court should be a separate court or an integral part of the existing judicial structure was examined in some detail in several reports that ultimately led to the establishment of a state-wide Family Court in New York State. Thus Professor Monrad Paulsen has observed:

" The 1961-62 court reorganization in New York State derived in part from studies and recommendations made by the Temporary Commission on the Courts, the so-called Tweed Commission. At first the Commission embraced the view that controversies involving children and families should be resolved in a single court but not in a separate Family Court. The creation of a Family Court was thought to be inconsistent with the Tweed Commission's basic purpose of integrating and unifying the entire court system. Family controversies, it was proposed, should be handled by a specialized part of a regular trial court. The court chosen should operate on the 'highest level practicable.' In such a court, the most wide ranging judicial powers could be focused upon problems of family law. The courts of the highest level would attract and keep first rate personnel. Further, a separate domestic relations and children's court 'tends to become isolated from the main judicial stream.' The Commission argued that a separate court would command less respect than a high ranking trial court and further that in a family tribunal, often, 'the social work function becomes controlling, to the detriment of the judicial function.' Perhaps the most important reason for rejecting a proposal for a family court was a practical one. It was highly unlikely that 'a separate Family Court would ever be given plenary jurisdiction over all family matters.'

This initial proposal of the Tweed Commission would have lodged all family matters, including non-contested matrimonial actions (divorce, annulment, separation and dissolution proceedings), in a special Family Part of the Supreme Court in New York City and in the County Court outside New York City. The County Court was chosen because in many of the smaller counties, the Supreme Court is geographically far removed from families in trouble, and in some counties a term of the Supreme Court is held only once every two or three months. The County Court, while not exercising the plenary power of the Supreme Court, is, of course, a court of generally wide jurisdiction. Undefended matrimonial actions were to be disposed of in the Family Part of the Supreme Court or of the County Court. Contested matrimonial matters would be transferred to a trial part of the Supreme Court.

A 1958 report of the Temporary Commission reported a change of position in response to vigorous criticism. The new recommendation urged the creation of a separate Family Court in New York City and the setting up of a Family Division of the County Court in upstate New York with the proviso that in counties having three or more county judges, one judge be designated as the Family Division Judge. Under the 1958 proposal, the Supreme Court would retain jurisdiction over all aspects of matrimonial actions and habeas corpus proceedings involving the custody of children except that the Supreme Court would be given the right to refer to the family tribunal habeas corpus proceedings and any phase of matrimonial actions except the actual trial of the issue of status.

After the Tweed Commission was abolished and the Legislature failed to enact its recommendations, the task of suggesting reorganization of the court structure was referred to the Judicial Conference by the Governor. In its report of November, 1958, the Judicial Conference recommended the establishment of a state-wide Family Court. This court, to be a court of record, was ultimately established by amendments to the State Constitution and ensuing legislative enactments.

The state-wide Family Court was to be given power over the following kinds of cases:

(1) The protection, treatment, correction and commitment of children who are in need of the exercise of authority of the court because of circumstances of neglect;

(2) The custody of minors except for custody incidental to actions and proceedings for marital separation, divorce, annulment of marriage and dissolution of marriage and except for custody in habeas corpus proceedings;

(3) The adoption of all persons;

(4) The support of dependents except for support incidental to actions and proceedings in this State for marital separation, divorce, annulment of marriage or dissolution of marriage;

(5) The establishment of paternity;

(6) Proceedings for conciliation of spouses;

(7) As may be provided by law, the guardianship of all persons; and

(8) Crimes and offenses, except felonies, by or against children or between spouses or between parent and child or between members of the same family or household.

The Family Court would also have jurisdiction to determine, with the same powers possessed by the Supreme Court, the following matters when referred to the Family Court from the Supreme Court:

(1) Habeas corpus proceedings for the determination of the custody of minors; and

(2) In actions and proceedings for marital separation, divorce, annulment of marriage and dissolution of marriage, applications to fix temporary or permanent support and custody, or applications to enforce judgments and orders of support and of custody, or applications to enforce judgments and orders of support and custody which may be granted only upon the showing to the Family Court that there has been a subsequent change of circumstances and that modification is required.

The power to grant divorce, annulments, marital separations and dissolutions of marriage was to remain in the Supreme Court.

The Tweed Commission had recognized that the failure to place matrimonial actions within the jurisdiction of a Family Court was a compromise with an ideal conception. The Commission, nevertheless, hailed its 1958 modified plan as a 'long step in the development of a unified Family Court.' The power of reference,' said the 1958 report, 'given to the Supreme Court will ... necessarily bring auxiliary services to assist the court in those family matters where such services are most needed.' During the first months of the new Act's operation, the optimism of the Commission has been only partially justified. While some upstate Supreme Court Justices have made references to the Family Court, those sitting in New York City have not done so.

The Court, then, as it emerged, is concerned with existing families and not with changes of family status. It may assist the Supreme Court in custody and support matters incident to matrimonial actions and thereby bring to that court the aid of the Family Courts Auxiliary Services." (560)

Correlative to the question of establishing a unified Family Court as part of the existing judicial structure is the question of the status to be accorded to the court. A substantial body of opinion favours the view that the Family Court should be part of the highest court of general trial jurisdiction. This view has been strongly endorsed in studies undertaken in the United States. For example, in a recent Report of the Family Court Study Commission for the State of New Jersey, it is stated:

"2. THE FAMILY COURT SHOULD BE A SEPARATE AND DISTINCT DIVISION OF THE SUPERIOR COURT OF NEW JERSEY.

Such action is (a) consonant with prevailing thought respecting consolidation of jurisdictions, (b) would cloak Family Court matters with a mantle of dignity and respectability which is necessary if the Court is to function as it should, (c) would confer appropriate status upon members of the Court for the handling of such matters, and (d) would invest the Court with statewide jurisdiction over persons which is also necessary to a properly functioning Family Court.

The Commission has also considered a proposal that Family Court judges be appointed directly to the Family Court Division of the Superior Court and that, by law, substantial restrictions be established which would prevent their assignment to other divisions of the Superior Court. The proponents of this position argue that judges dealing with family matters which are so often highly sensitive in nature requiring a substantial understanding of many human, sociological and psychological factors ought themselves to be both interested and capable of dealing in depth with such matters. They ought also to be able to develop substantial experience in dealing with such matters from the bench as well as having some relevant and helpful background experience before appointment to this Court. The Commission concludes that the present system of appointments to the Superior Court and assignments to its respective divisions ought not to be disturbed. The Commission has confidence that proper assignments will be made to the Family Court Division of the Superior Court with due consideration being given both to the willingness and aptitude of judges who will be called upon to serve in this highly specialized area.

As respects the administration of such a system it is clear that a central administration for the Family Court Division alone, located perhaps in Trenton, would be necessary to perform various functions including but not limited to rule-making,

management, clerk functions, centralization and retrieval of records, and the like. Locally, the assignment judge system might work but only if appropriate administrative staff support is available. With a sufficient number of judges and a presiding judge for each county or set of counties functioning with an adequate, properly trained and accessible staff to perform intake, counseling, enforcement and follow-up functions in addition to local administrative functions a family court system could work well to serve the citizens of New Jersey.

The Commission also recommends that:

3. THE FAMILY COURT SHOULD BE INVESTED WITH ALL THE SUBJECT MATTER JURISDICTION PRESENTLY RESIDING IN THE MATRIMONIAL PART OF THE CHANCERY DIVISION OF THE SUPERIOR COURT AND THE JUVENILE AND DOMESTIC RELATIONS COURTS AND WITH SOME OF THE SUBJECT MATTER JURISDICTION PRESENTLY RESIDING IN THE COUNTY COURTS AND THE MUNICIPAL COURTS.
4. TO THE EXTENT THAT THE FOREGOING RECOMMENDATION IS ADOPTED, THE MATRIMONIAL PART OF THE CHANCERY DIVISION OF THE SUPERIOR COURT AND THE JUVENILE AND DOMESTIC RELATIONS COURTS SHOULD BE ABOLISHED, WITH ALL JUDICIAL AND SUPPORTING PERSONNEL TRANSFERRED TO THE FAMILY COURT DIVISION OF THE SUPERIOR COURT." (561)

In formulating a Legislative Guide for Drafting Family and Juvenile Court Acts, the U.S. Department of Health, Education and Welfare also stated:

"SECTION 3. The Family Court Division

The family court shall be a division of [Insert name of highest court of general trial jurisdiction].

COMMENT

No attempt is made to provide for a specific organizational pattern for the court since State judicial systems differ from State to State. The family court should be a division of the highest court of general trial jurisdiction since an integrated court system is preferred rather than a proliferation of specialized courts. The establishment of the court at this level is also desirable since it is more likely to attract individuals of high judicial caliber and command the respect of the bar and the community." (562)

The above opinions respecting the status and place of the Family Court in the judicial structure have been shared by members of the judiciary. Thus, Judge Lindsay G. Arthur has stated:

"The Family Court must be a division of the highest court of general jurisdiction. It cannot be an inferior court or it will attract inferior people and acquire an inferior image. It must have the broadest of judicial authority, which can only be found in the general court. It must have more than statutory powers; it must have the general powers inherent in the most powerful of the trial courts." (563)

And Judge Paul W. Alexander has observed:

"Where the family court is a division of the trial court of general jurisdiction as in Ohio and Oregon, it already has all the original trial jurisdiction there is, civil, equitable, and criminal, and all cases involving peculiar family problems are routinely referred to and docketed in the family court division. This avoidance of all jurisdictional problems is one of the reasons the American Bar Association's committee on family court has always recommended there be a division of the trial court of general jurisdiction." (564)

The opinion that the Family Court should be part of the highest court of general trial jurisdiction has also been endorsed by legal practitioners and academics. (565)

The prestige and status problems that, to some extent, underlie proposals in the United States for establishing the Family Court as part of the highest court of general trial jurisdiction have been commented upon by Elizabeth and Richard Dyson in the following terms:

" The long history of the lack of prestige of juvenile courts has led most people who have studied them to urge that family courts be given status and powers on a par with the state's highest court of general trial jurisdiction. The most effective way to achieve such prestige, it is generally felt, is to establish the court as a division of the state's highest trial court. Both the Standard Family Court Act and Hawaii utilize this approach, Hawaii emphasizing the point by adding that 'the family courts...shall not be deemed to be inferior courts as that term is used in the State Constitution.'

Judging from attitudes of judges, lawyers and social workers in Hawaii's first circuit (the judicial subdivision where most of Hawaii's litigation and population are concentrated), the Hawaii Family Court is no less prestigious than other divisions of the court of general trial jurisdiction. The family court is housed in the general judiciary building, both in the first circuit and on the outer islands; it shares physical advantages available to all circuit judges, such as air-conditioning in the first circuit judiciary building and access to the well-stocked library of the supreme court. Whatever physical handicaps the court labors under are the same as those presently applicable to other divisions of the circuit court.

Rhode Island and New York go only part of the way in their attempts to create prestige equal to that of their general trial courts. The Rhode Island legislature did establish the family court on a state-wide basis and sought to endow its justices with 'all of the prerogatives and authority of associate justices of the superior court;' but structurally the court operates as a separate specialized court rather than as a division of the superior court. New York's Family Court Act applies to all counties as part of the unified court system for the state, but similarly the court operates apart from the supreme court, the court of general trial jurisdiction.

The prestige and status problems readily apparent in Rhode Island's and New York's family courts lend some credence to the view that dignity may be sacrificed if the family court is not set up as a division of the highest trial court. Of course, it must be remembered that most of the people who appear before family courts are members of the lower economic classes, notoriously poor lobbyists for their own causes. Thus it would not be surprising if legislators had a natural tendency to slight family courts in granting facilities and personnel. But this would seem to furnish all the more reason for family courts to start out as divisions of the highest trial court in order that they may at least share in whatever improvements are won for the highest trial court, as seems to be the case in Hawaii.

Physical facilities provide a telling index of the status of the Rhode Island Family Court. In Providence, where most of the court's business is conducted, the court shares an antiquated, poorly heated former school building with several other state offices. The building lacks a library for the judges; personnel offices are noisy and crowded; there are no conference rooms and lawyers must confer with their clients while standing in busy corridors. The building has been called a firetrap, potentially dangerous for employees and for court records stored in non-fireproof vaults. Some representative newspaper headlines tell the story: 'Family Court Closed; Bldg. Without Heat;' Judges Renew Appeal—Family court Center is "Just a Shambles." Not much money is spent on improving the court's image. When the chief judge's door became cracked it was replaced with a spare from the basement reading 'Supplies,' a label that has remained for

months. 'The family court's a dump,' a Providence lawyer commented. 'There isn't even a calendar on the wall.'

In contrast, the superior court building in Providence is well heated and in good repair. It has a library for the use of judges and attorneys, and contains a number of witness rooms where lawyers may confer privately with clients.

In the four other counties of Rhode Island facilities for all the courts are poor, but the family court seems to get the worst of these. The family court 'competes in the counties on a "catch as can basis"' for space in each county courthouse, and it usually has to yield main courtrooms to the superior court while meeting in 'third floor garrets' upstairs. One family court judge has publicly complained at being pushed off the first floor by sessions of the superior court. He says he 'would rather hold court in a butcher shop' than in the tiny, crowded room allotted to the family court in one county.

In New York City the family court has been described as 'a poor man's court. Lawyers are rare, courtrooms are bare, toilet walls are defaced. The court's waiting rooms resemble those at hospital clinics.' An argument frequently advanced against giving the family court exclusive jurisdiction over adoptions was the nice middle class people would then be exposed to the shabbiness of family court waiting rooms.

A few upstate counties have relatively new and modern plants for their family courts and some others have plans for them; many, however, have made do with antiquated buildings or rented office space. Supreme court facilities are far better by comparison. Because the supreme court occupies the position of 'political fair-haired boy of the state,' its branches have acquired large and dignified courtrooms, law libraries, and law clerks for the court's justices.

Family court salaries further suggest low status in Rhode Island and New York. Although Rhode Island Family Court judges are presently paid the same amount as superior court justices, as seems to be required by law, legislators have periodically tried to leave family court judges out of general judicial raises. New York family court judges are paid significantly less than supreme court justices. Family court probation officers in the city of New York for a long time received less than their supreme court counterparts, causing friction, loss of morale, and a high turnover rate. That particular problem is on its way out, it should be noted, since the policy was recently changed to enable all entering probation officers in the city to start at the same level.

A number of family court judges are known to dislike their work. This may be because of the quantity and kinds of cases a family court judge has to hear; it may be because of the lesser status they enjoy; or it may be a combination of these factors. At any rate, the Chief Justice of the Rhode Island Supreme Court was quoted publicly as saying he knew of at least one family court judge who detested his work. A superior court justice in Rhode Island told reporters that he would not want to be transferred to the family court, and in fact he knew 'of no Superior Court judge who would like to be transferred.' Family court positions in New York, outside of New York City, are usually not considered desirable as ends in themselves; they are commonly viewed as stepping stones to higher judicial positions. In 1967 New York's 103 family court judges urged that the court be made a division of the supreme court. 'Inherent in [such] a merger would be automatic increases in status and income for Family Court judges,' noted the *New York Times*."

The qualifications and competence of Juvenile Court judges has also provoked critical comment. Thus, Joel F. Handler has stated:

"[The] quality, interest and training of the Juvenile Court judges leaves much to be desired. The original understanding called for dedicated, highly-trained specialists of prestigious status. What has generally happened, however, is that the Juvenile Court is considered to be the lowest rung on the judicial ladder. Rarely does the court attract men of maturity and ability. The work is not regarded as desirable or appropriate for higher judgeships..." (567)

Similar sentiments may be implicit in the following opinion expressed by Professor Hugh Silverman respecting Family Court judges in Canada:

"With respect to the appointment of judges to that court, and their status in the judicial hierarchy, it is a fair assessment to say that the Family Court judge is almost at the bottom of the judicial totem-pole, just a notch above the justice of the peace, but just a notch below the next rank, the provincial criminal court judge or magistrate." (568)

Submissions in the United States recommending that the Family Court should be a part of the highest court of general trial jurisdiction have frequently been accompanied by proposals respecting the appointment of referees to assist the Family Court judges in the disposition of matrimonial, familial and juvenile proceedings, the purpose of such appointments being presumably to reduce the judges' caseload and the overall cost of the administration of justice in such proceedings. Commenting upon the use of referees and the differing opinions respecting the desirability of such use, Elizabeth and Richard Dyson have observed:

" Referees or masters are sometimes used in civil cases to expedite the business of the courts. Basically referees are non-judges acting in a semi-judicial capacity, saving judges' time by hearing parties' cases and making findings and recommendations to the court. These the court usually adopts as its decree. Parties reluctant to use referees may usually demand a full judicial hearing, and where a referee has been held, various safeguards are extended concerning matters of notice and appeal. For example, under the Standard Family Court Act, the parties must be notified within a short period of the referee's findings, and they can either appeal the findings or request a hearing de novo before the trial judge.

The Standard Act draftmen did not unanimously favor using referees; some of them felt that judges should hear all cases and that efficient screening procedures could adequately reduce the number of cases requiring judicial attention. They compromised ultimately on a permissive section for the appointment of referees, as did the framers of Hawaii's Family Court Act. Under both acts, if referees are used they are to be appointed by the judge through a merit system, and are to hold office at his pleasure. Under the Standard Act referees must be 'suitable persons trained in the law,' but non-lawyers are apparently permitted under Hawaii's Act.

Hawaii's Family Court Act prescribes compensation of referees according to the provisions of the Civil Service Act. This act sets up a scale of salaries by classes, to which various jobs are administratively assigned. Presently the minimum starting salary for referees in the first circuit is \$13,176 — roughly half of what the judges earn.

Judicial business is not sufficient outside the first circuit to require referees. They are heavily depended on, however, in the First Circuit Family Court. There five referees handle about 95 per cent of the judicial business. Two of them concentrate on domestic relations cases; the other three specialize in the juvenile field. In effect, all cases are heard by the referees except contested divorce cases and juvenile cases involving unusual legal issues or possible incarceration at the Hawaii Youth Correctional Facility. In all other cases the referees are really judges for all intents and purposes, since their findings and recommendations are usually accepted as the court's decree and appeals are taken from less than five per cent of all their decisions.

The senior judge in the first circuit is enthusiastic about the referee system. One advantage is the cost factor: their salaries are lower than judges' salaries, and the legislature is said to be more willing to create new referee positions since each new position does not require a certain number of additional clerks and bailiffs. Also, the senior judge feels that the referee system enables him to exercise control over policies and philosophy of the court. Since referees have no tenure, the judge is free to dictate policies that must be followed by all of them. By contrast, the senior judge noted, a court with five different independent judges often presents 'five different faces of justice to the average Mr. Citizen,' who may be 'more concerned about uniform treatment in the amount of alimony awarded against him than about his more abstract procedural rights.'

Why Rhode Island does not use referees is not entirely clear. As a small state with a manageable volume of family court cases, it may have been felt that case backlog problems could easily be handled by adding more judges. Some of the judges do feel, however, that 'the work load of the judges...is almost at the saturation point;' and the court administrator once said that someone 'like a referee' could be useful to the court in handling certain minor cases now dealt with by the judges.

New York has intense case backlog problems, though they are spread somewhat throughout the state. The administrative Board of the Judicial Conference has indicated increasing concern over the mounting backlog of cases. By the end of June, 1967, the backlog had risen to almost 50,000 cases, a figure termed 'near critical proportions' by the Board. There is no problem in the juvenile area, where delinquency cases must be processed fairly swiftly by law; it is mainly the support cases, which constitute 40 per cent of the court's total business, that lag behind. In upstate counties there may be a period as long as six months before a preliminary hearing is even scheduled in a support case.

Some officials close to New York's system feel that the case backlog problem is not primarily attributable to lack of judicial manpower. The problem as they see it lies in a shortage of probation services, which leads to undue delay in the investigation and policing of support cases. If this is the source of the backlog problem, using referees in addition to judges would not provide an answer; part of the solution would seem to lie in increasing probation and clerical personnel.

At any rate, the chief draftsman of the New York Family Court Act felt that a referee provision would have been out of keeping with the spirit of the Act. Under his view, the whole tenor and thrust of New York's Act was to affix judicial responsibility for intervention in the lives of citizens. Referees would have detracted from that purpose, rather than aiding its realization." (569)

In the several Canadian provincial studies on the concept of unified Family Courts, there has been general agreement that specially constituted Family Courts should be established as courts of superior jurisdiction but the reports provide diverse formulas respecting the place of such Family Courts in the existing judicial structure,

the appointment of judges to such courts, and the feasibility and desirability of establishing a two-tiered system within such Family Courts. It will accordingly be necessary to examine each of the provincial reports in some detail.

Examining the aforementioned issues, the Working Paper on Family Court prepared by the Institute of Law Research and Reform, Alberta, stated:

"RECOMMENDATION #1

*THAT EXCLUSIVE JURISDICTION IN FAMILY
LAW MATTERS AS DEFINED IN THIS PAPER
BE CONFERRED UPON ONE COURT.*

B. Choice and Creation of Court

If there is to be one court, there are various courses of action available.

One course of action would be to establish a separate court which would have exclusive jurisdiction in all of Family Law. A second would be to create a division of each District Court which would have this jurisdiction. A third would be to create a Court which would be part of the Supreme Court of Alberta.

To make a court part of the Supreme Court and to confer exclusive Family Law jurisdiction upon it would be to show that Family Law is considered to be of sufficient importance to justify the attention of the highest court of original jurisdiction in the province. There is a very strong prejudice, which must be recognized, that a Family Court will inevitably resemble a social agency more than a court of law. The association of Family Law with one of the traditional courts would, we believe, help to do away with this prejudice. The regard in which the court administering Family Law is held will be a considerable element in its acceptance by the legal profession and the public and in its ability to attract judges of the highest capacity.

The establishment of a Family Court as part of the Supreme Court would, we think, be a valuable step in adapting the traditional courts to the needs of the times. The development of somewhat specialized branches of courts of general jurisdiction has much to be said for it as opposed to the development of a multiplicity of courts and will tend to preserve the essential values of the traditional courts. We believe that there is much to be said also for the proposition that the development of Family Law should be carried on by the traditional courts but through a specialist division or section with modified procedures.

There are arguments to the contrary. The form and structure of the traditional courts may unduly influence the development of the Family Court away from the directions required by the particular considerations of the types of problem involved in Family Law. There may be a tendency to apply procedures suited for the determination of other issues but too time-consuming, expensive and impersonal for Family Law problems. There is a danger that the concept of the unified Family Court might be adopted, but that in order to save appointments a rotation system of judges of general trial jurisdiction might be adopted, instead of a system of specialist judges which we think is needed.

A separate court would have advantages. It would be free to develop its own philosophies, procedures and administrative practices. It would be less likely to be affected by the philosophy of the superior courts which, as we have indicated, we think to be less well suited to the resolution of Family Law problems than to the solution of problems in other areas of law. The constitution and structure of the court could be considered with more reference to its suitability to the problems to be brought before it and with less reference to procedures and practices developed primarily for other problems.

We think that there is less chance that a separate Family Court would be accorded the prestige and accompanying advantages available to a Family Court forming part of the Supreme Court. If this opinion should be borne out by the facts, the separate Family Court would have greater difficulty

in attracting the best judges than would a Family Court forming part of the Supreme Court.

If there is to be a separate Family Court, the legislation must make it clear that it is a superior court of record with exclusive jurisdiction in the areas of law included within the term 'Family Law' as we have defined it in this Working Paper. ...

There would be some advantages to constituting a division of the District Court as the Family Court. The District Court is more accustomed to depart from traditional procedures through its experience in such areas as small claims, and, particularly in the areas of adoptions and long-term wardships which are Family Law matters and in which the procedures are simplified and involve the judicial assessment of reports by persons in the behavioural disciplines. The District Court is accustomed to travel more widely and more frequently through the province than is the Supreme Court. The District Court bench could provide a useful source of judges with experience and interest in Family Law, while Family Law matters in the Supreme Court are among the less interesting and desirable matters of business. On balance, however, we believe that the desirability of associating the Family Court with the highest court of original jurisdiction outweighs these considerations.

For these reasons we recommend that the Family Court be part of the Supreme Court of Alberta.

It is necessary to consider the relation of the Family Court to the Supreme Court.

Our preference would be to see the Family Court as a family section of the Trial Division, separate in organization and with specialized judges and a presiding judge, but recognizing the Chief Justice of the Trial Division as its formal head. This structure would allow divorce matters to be assigned to the family section without a special amendment to the Divorce Act and would give the Family Court a place within the court of the highest original jurisdiction.

The views of the Trial Division would have to be considered, as it would be difficult to ensure the proper working of a section of that division if the division were adverse to its creation. The issue of this Working Paper will provide an opportunity for the final formulation of those views. (570)

If the creation of a Family Court of the Trial Division should prove not to be feasible, we would recommend the creation of a Family Division of the Supreme Court. This would be a third division added to the Appellate Division and the Trial Division. It would be quite separate from the Trial Division and would be presided over by a Chief Justice. The resulting structure would bear some resemblance to that of the English High Court which now has a Family Law Division.

The Family Division would have administrative advantages in that it would not be involved in any way in the administration of the Trial Division and would be entirely separate from it. Its establishment would require an amendment to the Divorce Act and it would not be as closely associated with the existing Supreme Court.

We leave a final recommendation as to structure to be formulated after we receive comments on this Working Paper.

RECOMMENDATION #2

(1) THAT THE COURT TO EXERCISE EXCLUSIVE JURISDICTION IN MATTERS OF FAMILY LAW BE PART OF THE SUPREME COURT OF ALBERTA

(2) THAT THE FAMILY COURT BE EITHER

(i) A FAMILY COURT SECTION OF THE TRIAL DIVISION, SEPARATE IN ORGANIZATION AND WITH SPECIALIZED JUDGES AND A PRESIDING JUDGE, BUT RECOGNIZING THE CHIEF JUSTICE OF THE TRIAL DIVISION AS ITS FORMAL HEAD; OR

- (ii) A FAMILY DIVISION OF THE SUPREME COURT SEPARATE FROM THE TRIAL DIVISION AND PRESIDED OVER BY A CHIEF JUSTICE.
- (3) THAT IF IT IS NOT PRACTICABLE TO CARRY OUT RECOMMENDATION #2(1), THE FAMILY COURT BE SET UP SEPARATELY AND INDEPENDENTLY FROM EXISTING COURTS.
- (4) THAT IF THE FAMILY COURT BE A FAMILY DIVISION OF THE SUPREME COURT OR A SEPARATE COURT THE DIVORCE ACT BE AMENDED SO THAT JURISDICTION IN DIVORCE AND COROLLARY MATTERS WILL BE CONFERRED UPON IT.
- (5) THAT IF THE FAMILY COURT BE A COURT SET UP SEPARATELY AND INDEPENDENTLY FROM EXISTING COURTS, THE LEGISLATION SHOULD MAKE IT CLEAR THAT IT IS A SUPERIOR COURT OF RECORD.

C. Appointment and Jurisdiction of Judges

We are convinced, for the reasons which we have given, that there should be one Family Court exercising jurisdiction in all Family Law matters. For constitutional reasons, the court must be a superior court.

These constraints make for difficulty in deciding what judicial functionaries are to exercise the various jurisdictions of the court, and how they are to be appointed. The difficulty can be resolved only by a departure from existing practice and existing patterns of thought. Considering as we do that the unified or integrated Family Court is essential, we can only say that in our opinion the difficulties must be overcome even if the solution gives rise to administrative difficulties or difficulties of jurisdiction as between federal and provincial authorities.

We will discuss the available alternatives.

1. Judges of Equal Jurisdiction

The best Family Court in our opinion would be a court consisting of judges of equal

jurisdiction available for all the work of the court and presided over by a presiding judge who would be only a first among equals. However the jurisdiction of the Family Court would include jurisdictions which can only be exercised by judges appointed under section 96 of the British North America Act and it therefore follows that all judges of a court so constituted would have to be appointed by the Governor General. We see the following problems:

- (a) The Minister of Justice of Canada would become responsible for the finding, appointment and payment of several more judges. He would have to make the choices from Ottawa. He would have to do so on the basis of qualifications which will vary from those desirable in judges of general trial jurisdiction to an extent which may well create a very considerable administrative problem.
- (b) These judges would have the tenure granted by the British North America Act. This would not necessarily be bad, but it would require thinking quite different from that which now obtains with regard to the tenure of judicial officers who act as magistrates and provincial judges and as Family Court and Juvenile Court judges.
- (c) The Judges' Act requires ten-years' standing at the Bar of a province as a qualification for appointment to a superior court. We think that there is a place in the Family Court for responsible judicial officers who do not have this qualification. A solution to this problem of qualification would be to provide, in the Judges' Act or elsewhere, for a separate category of judges for courts of the type which we propose. An important though temporary problem would arise from the fact that some judges of the existing Family Court do not have formal legal training and we think it desirable that their experience and capabilities be taken into the proposed Family Court.

- (d) The salaries provided in the Judges' Act would apply. We do not think it bad that all judges of the Family Court be well paid, but we are afraid that in practice the increased cost would not be palatable to either government. This problem, if it is one, could also be cured by the creation of another category of judge in the Judges' Act or elsewhere. This solution would take away from the treatment of Family Court as one of the highest importance and would therefore be objectionable.
- (e) The responsibility for the salaries would be transferred to the federal government. This would not necessarily be bad, but the federal government might well resist the increased charge on its revenues. This problem could be solved by an agreement whereby the provincial government would contribute to a fund which would provide part or whole of the additional salaries; but the negotiation of such an agreement would be difficult and might not be successful. In addition to financial implications, the question of provincial participation in appointments might be raised if there is to be provincial participation in payment.
- (f) The provincial government might well be unwilling to agree to a transfer of the appointing power to federal authorities. They may well feel that the progressive Family Court system which now exists would be jeopardized if the power to choose all the judges of the court were to be transferred to Ottawa.

D. A Two-tiered Court

1. Judges of Separate Jurisdiction

We have considered the possibility that federally appointed judges might exercise and exercise only the jurisdictions which require a judge appointed by the Governor General. They

would, therefore, primarily have jurisdiction in nullity, divorce, judicial separation and property matters. Provincially appointed judges would then exercise jurisdiction in all matters which do not require a federal appointment.

We have rejected such an arrangement. We expect that it would result in what would virtually be two separate courts which would only nominally be one. The experience of each class of judges would be kept within unduly narrow bounds. Both categories of judicial position would be rendered undesirable. Although there would only be one court the problems of fragmented jurisdiction would remain.

2. Judges, Masters and Referees.

We have also considered an arrangement whereby a small number of judges appointed by the Governor General would be supplemented by referees or masters. Under this arrangement, most hearings would be conducted by junior judicial functionaries who would make a report and recommendation to the judge who would make the final decision. This indeed is the recommendation made to the Attorney General by the Law Society.

This arrangement would leave the control of the court in the hands of the judge or a small number of judges. It would tend to ensure a consistent approach to the administration of justice in the court. If it is to be assumed that the persons of the very highest qualifications were the judges, the business which the most highly qualified persons could do would be much increased. The constitutional problems and the problems under the Judges' Act which cause us concern would not arise.

However we are, on balance, against this proposal. We think that litigants should appear before the deciding officer. We think that the advantages of attention of the highly qualified judge to each case would largely be illusory. If he followed uncritically the recommendations made to him he would virtually be a rubber stamp. If he rejected those recommendations he would be substituting his views for those of the functionary who saw the witnesses and heard the evidence. We think that it would be difficult to attract the best people to junior posts in which they would not have the power to decide.

3. Federal Judges and Provincial Judges

Leaving aside a constitutional problem to which we will return, we would recommend that most of the judges be appointed to the court by the Lieutenant Governor in Council, and that these judges should have as much jurisdiction as a provincial appointment can give them. We believe that experience with such appointments has shown that well qualified people can be attracted to the position of a provincially appointed Family Court judge. We believe that with careful selection, proper training, and adequate experience provincially appointed judges can properly exercise such jurisdiction. We believe that the granting of such jurisdiction will tend towards the greatest degree of flexibility in the administration of the court.

We would recommend also that judges be appointed to the court by the Governor General and that these judges should be able to exercise all the jurisdictions of the Family Court. We see no point in confining federally appointed judges to those jurisdictions which only a federally appointed judge can exercise; we believe that such a judicial diet would not be attractive and we believe that the federally appointed judge should have experience throughout the whole field of Family Law.

Our detailed recommendations as to the jurisdictions to be exercised by federally appointed judges and provincially appointed judges appear in the table which follows:

	Federal Judges	Provincial Judges
Divorce	x	
Nullity of Marriage	x	
Judicial Separation	x	
Restitution of Conjugal Rights	x	
Loss of Consortium	x	

Cont'd	Federal Judges	Provincial Judges
Injunction re Matrimonial Property (<u>Note 1</u>)	x	
Other Actions re Matrimonial Property	x	
Jactitation of Marriage	x	
Declarations of Status including Declarations of Legitimacy	x	
Alimony or Inter-spousal Mainte- nance (<u>Note 2</u>)	x	x
Protection Order - Maintenance for Deserted Wife	x	x
Maintenance of Children	x	x
Custody, Access	x	x
Interim Corollary Relief	x	x (Master)
Enforcement of Alimony or Maintenance Orders	x	x
Reciprocal Enforcement of Alimony or Maintenance Orders	x	x
Charges under C.C.C.	x	x
Charges under Provincial Legis- lation	x	x
Juvenile Offences	x	x
Committal Powers	x	x
Neglected Children Temporary Wardship Permanent Wardship	x x	x x
Guardianship of the Person	x	x
Guardianship of the Property (<u>Note 3</u>)	x	x
Adoption	x	x
Affiliation Proceedings	x	x

- Note 1: Some of us would give the provincial judges jurisdiction to grant injunctions concerning matrimonial property. The majority are, however, of the opinion that the jurisdiction to proceed by way of injunction should generally be restricted to superior court judges in general and therefore to federally appointed judges of the Family Court.
- Note 2: By a bare majority we tentatively recommend that actions for alimony and maintenance be included in the jurisdiction of provincially appointed judges. We include matters encompassed by sections 16 and 27 of the Domestic Relations Act. There may be some doubt as to whether jurisdiction in alimony actions must be exercised by a judge appointed by the Governor General in Council. The law relating to alimony and maintenance will be considered by the Institute in its Family Law project.
- Note 3: Some of our members would give the provincially appointed judges jurisdiction over guardianship of property.

Pursuant to the policy of conferring as much jurisdiction as possible upon provincial judges, we believe that they should be appointed masters and referees and should exercise the jurisdictions normally vested in those officers.

This arrangement would, we think, be reasonably satisfactory. We think it would minimize the problems which we see in having all judges of equal jurisdiction.

We return, however, to the constitutional problem.

Most of the cases on section 96 of the British North America Act deal with the creation of offices outside of superior, district and county courts, and turn on the question whether the jurisdiction conferred upon the holders of these offices is jurisdiction which is properly exercisable only by judges of the superior, district or county courts. Other cases deal with the giving of additional jurisdiction to junior functionaries of superior courts, e.g., masters, whose function is known and understood.

If a court is to be set up with federally appointed judges and provincially appointed judges, it will be necessary to consider section 96 which we quote here again:

' The Governor General shall appoint the Judges of the Superior, District and County Court in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.'

It will be seen that an argument can be mounted as follows:

- (1) The proposed Family Court will be a superior court.
- (2) The proposal is that the province appoint judges, albeit of limited jurisdiction, to that court.
- (3) Those appointments would be constitutionally invalid because they would be appointments of 'Judges' to a 'Superior Court'.

The argument in favour of the constitutional validity of the proposal would be that judges so appointed would not be 'Judges' of the 'Superior Court' in Alberta. What is meant by 'Judge' is one who exercises jurisdiction of a judge of a superior court within the meaning of those terms in section 96; while the proposal would clothe provincially appointed judges only with jurisdictions which are clearly not those of a "Judge of a Superior Court" as those terms are used in section 96. It cannot be contemplated that the province can under the constitution appoint a judge to exercise certain jurisdictions in one courthouse but not in another. The test is whether the jurisdiction conforms to that of a 'Judge' of a 'Superior Court'. The name of the functionary who exercises the jurisdiction is nothing in point.

Unfortunately we do not believe sufficient certainty can be achieved except by a decision of a court. We do not think the proposed Family Court should be set up with an unresolved substantial doubt as to the authority of the functionaries who will deal with an important part of the business of the court.

If we are not able to resolve our doubts before our final report is issued, and if the arrangement of federally and provincially appointed judges continues to appear to be the more practical constitution of a court, we will give consideration to a recommendation that a bill will be introduced into the Legislature providing for a court so constituted and that an immediate reference be made to the courts to determine the constitutional validity of the proposal. The reference could be made under the Constitutional Questions Act (Alberta) or the Supreme Court Act (Canada) but the question should be dealt with by the Supreme Court of Canada in order to go as far as possible in allaying doubts.

4. Two Courts

If the result of such a reference should be adverse, we think that the consequences of having judges of equal jurisdiction should be accepted.

Failing that, we think that consideration would have to be given to an alternative which would be acceptable only if there is no possibility of achieving a one-tiered court or a satisfactory two-tiered court.

This alternative would be to establish a system of two courts so arranged as to try to realize the advantage of one court. A 'Provincial Family Court' could be constituted which would be legally distinct from but administratively combined with a Family Court section or division. The provincial judges and the federal judges would be members of the provincial Family Court. The federal judges alone would be members of the Family Court section or division. Only the Family Court section or division would be a superior court and it would as such exercise only the jurisdictions which according to the chart on pages [618 & 619] would be exclusively reserved for federal judges. The Provincial Family Court would exercise those jurisdictions which according to our chart could be exercised by both federal judges and provincial judges. The provincial judges could be masters and referees of the Family Court section or division. Needless to say, the division of courts in this way would result in administrative and conceptual complications and difficulties which should not be accepted if anything better can be devised.

5. Summary

We end this part of our discussion as we began, by saying that in our view the establishment of one court to exercise all jurisdictions in Family Law is essential in the public interest and that any administrative disadvantages and difficulties resulting from the establishment of one court must be accepted. If the constitution requires that all judicial appointments to a unified court be made by the Governor General, then we think it the duty of the federal and provincial authorities to work out a means by which this can be done. If it is necessary to have two courts in name in order to achieve one court in substance, then and only then will the last alternative be supportable.

We specifically ask the federal and provincial authorities for comments and suggestions as to these proposals and as to any other alternatives which will provide a unified or integrated Family Court of exclusive jurisdiction devoted to matters of Family Law.

6. Powers of Other Judges

There will inevitably be practical problems in extending the services of the Family Court throughout the province. There will be a period during which the court is being built up and during which it will not be able to serve its ultimate area. Some parts of the province are so sparsely populated and so distant from urban centres that it will not be practicable to serve them in the foreseeable future.

We recommend that the judges of the Supreme Court be empowered to sit as Family Court judges and to exercise all the jurisdictions of the Family Court. We recommend also that District Court judges, sitting as local judges of the Supreme Court, have the same powers.

We recommend also that where it is impracticable to provide Family Court services through full-time provincially appointed judges of the Family Court, the Lieutenant Governor in Council should be empowered to appoint part-time provincial judges of the Family Court, with power to restrict

their jurisdiction to such Family Court matters as are specified in the Order in Council making the appointment. The government would then be able to appoint a resident in an outlying area who appears likely to be able to give good service, and to make use of provincial judges who are not members of the Family Court. If the Family Court judges are all appointed by the Governor General, this recommendation will have to be reconsidered.

We emphasize that our goal is to have all Family Law matters administered by full-time specialized judges of the Family Court, whether resident or on circuit. We recognize, however, the practical limitations imposed by geography and availability of personnel and facilities and make these recommendations so that residents of outlying areas will not be deprived of service by reason of our recommended reforms. It follows that Supreme Court judges should sit as Family Court judges only when judges of the Family Court are not readily available and that part-time provincial appointments should be made only where the services of full-time Family Court judges cannot readily be made available.

7. Recommendations as to Membership of Court

RECOMMENDATIONS #3

(1) THAT THE FAMILY COURT BE COMPOSED OF JUDGES APPOINTED BY THE GOVERNOR GENERAL AND HAVING EQUAL JURISDICTION:

OR ALTERNATIVELY

(2) (i) THAT THE COURT BE COMPOSED OF A LARGER NUMBER OF JUDGES APPOINTED BY THE LIEUTENANT-GOVERNOR IN COUNCIL AND A SMALLER NUMBER OF JUDGES APPOINTED BY THE GOVERNOR GENERAL;

(ii) THAT THE JUDGES APPOINTED BY THE LIEUTENANT-GOVERNOR IN COUNCIL IN GENERAL BE CLOTHED WITH THE JURISDICTIONS SHOWN IN THE TABLE ON PAGES [618 & 619];

- (iii) THAT THE PROVINCIAALLY APPOINTED JUDGES BE APPOINTED MASTERS AND REFEREES OF THE FAMILY COURT;
- (iv) THAT THE PROVINCIAALLY AND FEDERALLY APPOINT JUDGES BE APPOINTED JUDGES OF THE JUVENILE COURT;
- (v) THAT THE FEDERALLY APPOINTED JUDGES OF THE FAMILY COURT BE CLOTHED WITH ALL JURISDICTIONS CAPABLE OF BEING EXERCISED BY THE FAMILY COURT INCLUDING ALL THOSE TO BE EXERCISED BY PROVINCIAALLY APPOINTED JUDGES; AND THAT
- (vi) A BILL BE FORTHWITH INTRODUCED INTO THE LEGISLATURE PROVIDING FOR A COURT SO COMPOSED AND THAT AN IMMEDIATE REFERENCE BE MADE UNDER THE CONSTITUTIONAL QUESTIONS ACT TO DETERMINE THE VALIDITY OF THIS RECOMMENDED CONSTITUTION OF THE FAMILY COURT;

OR ALTERNATIVELY, IF ALL THE FOREGOING PROPOSALS ARE IMPOSSIBLE,

(3) THERE BE CONSTITUTED BOTH;

- (i) A PROVINCIAL FAMILY COURT (WHICH WOULD NOT BE A SUPERIOR COURT) THE MEMBERS OF WHICH WOULD BE PROVINCIAL JUDGES AND FEDERAL JUDGES (ALL OF WHOM WOULD BE APPOINTED JUDGES OF THE JUVENILE COURT) AND WHICH WOULD EXERCISE THE JURISDICTIONS WHICH ACCORDING TO OUR PREVIOUS PROPOSAL WOULD BE EXERCISABLE BY BOTH FEDERAL JUDGES AND PROVINCIAL JUDGES; AND
- (ii) A FAMILY COURT SECTION OR DIVISION (WHICH WOULD BE A SUPERIOR COURT) THE MEMBERS OF WHICH WOULD BE FEDERAL JUDGES AND WHICH WOULD EXERCISE THE JURISDICTIONS WHICH ACCORDING TO OUR PREVIOUS PROPOSAL WOULD BE EXERCISED BY FEDERAL JUDGES ONLY (THE PROVINCIAL JUDGES OF THE PROVINCIAL FAMILY COURT TO BE MASTERS AND REFEREES THEREOF);

THE TWO COURTS TO BE SEPARATE IN NAME AND LEGAL STRUCTURE BUT OTHERWISE TO BE ADMINISTERED AS MUCH AS POSSIBLE TOGETHER AND GENERALLY TO ACT AS ONE COURT TO THE GREATEST EXTENT POSSIBLE.

RECOMMENDATION #4

THAT SUPREME COURT JUDGES, AND DISTRICT COURT JUDGES ACTING AS LOCAL JUDGES OF THE SUPREME COURT, BE EMPOWERED TO SIT AS JUDGES OF THE FAMILY COURT SECTION OR DIVISION AND ALSO OF THE PROVINCIAL FAMILY COURT IF ONE IS CONSTITUTED, WHEN JUDGES OF THE FAMILY COURT ARE NOT READILY AVAILABLE.

RECOMMENDATION #5

- (1) THAT THE LEGISLATURE EMPOWER THE LIEUTENANT-GOVERNOR IN COUNCIL TO APPOINT PART-TIME FAMILY COURT JUDGES TO PROVIDE THE SERVICES OF THE FAMILY COURT OR OF THE PROVINCIAL FAMILY COURT IF ONE IS CONSTITUTED WHERE IT IS IMPRACTICABLE TO DO SO THROUGH FULL-TIME PROVINCIALY APPOINTED JUDGES OF THE FAMILY COURT.
- (2) THAT THE LIEUTENANT-GOVERNOR IN COUNCIL BE EMPOWERED TO RESTRICT THE JURISDICTION CONFERRED UPON PART-TIME JUDGES TO SUCH MATTERS AS MAY BE SPECIFIED IN THE ORDER IN COUNCIL MAKING THE APPOINTMENT.
- (3) THAT SUCH APPOINTMENTS SHOULD BE MADE ONLY IN ORDER TO PROVIDE FAMILY COURT SERVICES WHEN IT IS NOT PRACTICABLE FOR FULL-TIME FAMILY COURT JUDGES TO DO SO."(571)

The recommendations of the Institute of Law Research and Reform, Alberta respecting a two-tiered system bear some resemblance to the following alternative proposals formulated by the Ontario Family Law Project:

" The Family Law Project has considered a variety of suggestions as to the best organization of family courts in Ontario. To facilitate an examination of this problem, two different schemes of a possible provincial family court system will not be considered.

Scheme A

...The structure of Scheme A is essentially a combination of (1) judges being allocated to a local area, and (2) a circuit system, whereby certain of the judges will be based at a headquarters in Toronto and will travel to circuit centres in the Province and hold court there. This result would be achieved by having two categories of family court judges, namely senior judges and junior judges. The chief judge and the other senior family court judges should have special experience and qualifications. It would be hoped that they would set standards for the judicial process in the family court system. As indicated, the senior judges would go on circuit throughout the Province as well as, of course, functioning in the courts in the headquarters of the system in Toronto. The junior judges, on the other hand, would be assigned by the chief judge to particular counties or districts or to the headquarters of the system in Toronto. There would therefore be a rough analogy between the system here proposed, and the system of High Court and County Court judges, in that the senior judges would be based in Toronto and would regularly go on circuit throughout the Province, whereas the junior judges would be assigned by the chief judge to a particular county or district or to the headquarters court in Toronto.

...One of the objectives of Scheme A is to give the family court system a comprehensive jurisdiction in family matters. The basic reasons for this are:

- (a) to facilitate specialization;
- (b) to attract the right calibre of person into the system for judicial and other appointments, by providing the court with a wide and interesting range of work;
- (c) to bring family matters, as far as possible, within the ambit of one court system, because, as has already been pointed out, family questions are usually more complex than the actual issue litigated. Further, the jurisdiction of

the family court system should be an exclusive jurisdiction and should not be shared with another court as, for example, under the present law, where support questions can be litigated in the High Court (as 'alimony') and also in the Family and Juvenile Court under the Deserted Wives' and Children's Maintenance Act; or in the case of custody of children, where the jurisdiction is shared by the High Court, the Surrogate Court, and the Family and Juvenile Court (if the wife is also suing for maintenance).

To produce a desirable range of jurisdiction, it is recommended that the senior judges should be appointed after joint consultation between the Federal Government and the Provincial Government concurrently as: (1) judges of the Divorce Division of the Exchequer Court and (2) as Provincial Judges (Family Division). The senior judges would have the power to try those family law cases which presently lie within the jurisdiction of High Court Judges in Ontario, for example, divorce cases. This would mean that actions of divorce and proceedings for declaration of status (including property questions, assessment of balancing claim, and questions associated therewith, which will arise if effect is given to the recommendations already made by the Family Law Project Property Study) will be tried by senior judges.

In result, therefore, the family court system for Ontario would include the following subjects in its exclusive jurisdiction : divorce; proceedings for declaration of status (including property and financial questions associated therewith); the present topics under the Child Welfare Act (i.e., neglected children, children of unmarried mothers, adoption); guardianship and custody (whether or not connected with divorce proceedings or proceedings for declaration of status); delinquency; the enforcement of maintenance obligations; family criminal matters (such as assault by one spouse on the other).

Scheme B

The outstanding feature of Scheme B is that under it the family court system is organized as a Division of the High Court. The idea of having a Family Division of the High Court has been considerably canvassed, both in Great Britain and on this side of the Atlantic.

Certain arguments have been advanced in favour of this proposal and an attempt can be made to summarize them as follows:

1. The real importance of matters that come before family courts is not always properly appreciated and their weight is too often assessed in terms of legal technicality and money value. Consequently, when litigation is viewed on this materialistic basis, cases concerning corporations, tax, and so on, tend to be regarded as far outweighing domestic cases, and cases concerning delinquent or neglected children. This kind of distinction has been examined earlier in this chapter and it has been stressed that it is not the correct one on which to assess the importance of litigation when social and human values are properly taken into account.

2. The High Court is already substantially involved in family law questions, particularly in the areas of divorce, declaration of status, and so on. The constitutional approach at present seems to be that matters of this kind should be dealt with by federally appointed judges.

3. The creation of a Family Division of the High Court would attract men of high judicial calibre and command the respect of the legal profession of litigants, and of the community generally.

4. The creation of a Family Division of the High Court would facilitate the development of an extended and comprehensive jurisdiction in family law matters, which would seem to be desirable. Such comprehensive jurisdiction would bring matters such as divorce, declaration of status, custody, support actions, delinquency, neglect, adoption, and so on, all under the one judicial 'umbrella'. It can be argued, of course, that some of the matters that come before family and juvenile courts at the present time are of too minor a character to require the attention of a High Court judge. If a Family Division of

the High Court was created, it would still be necessary to have Provincial Judges in local areas and analogous to Scheme A Scheme B would involve a combination of:

- (a) High Court judges, appointed to a Family Division of the High Court, and
- (b) Provincial Judges.

Another point of comparison with Scheme A would be that the High Court judges at the present time are accustomed to go on circuit and therefore the circuit concept, which was part of Scheme A, in relation to the senior judges, could also operate in regard to Scheme B. At the present time, the High Court of Ontario is not organized into divisions and therefore a Family Division could be a considerable innovation. By section 23 of the Divorce Act, 1968, the Exchequer Court Act is amended to provide for the establishment of a Division of the Exchequer Court called the Divorce Division. This court has certain functions in regard to dissolution of marriage, etc., under the Divorce Act. [See now Federal Court Act, R.S.C., 1970, c. 10 (2nd Supp.)]. In England, the High Court has for some considerable time been organized into three Divisions, namely, the Queen's Bench Division, the Chancery Division, and the Probate, Divorce and Admiralty Division [now Family Division].

...The present organization of the High Court in Ontario as a single court without divisions or specialization is not, of course, an inevitable or universal pattern. As already mentioned, a Divorce Division of the Exchequer Court has been set up by the Divorce Act, and the High Court in England is organized into Divisions. Even within the Divisions of the English High Court, there is further specialization in certain cases. It is normal, for example, for at least one Chancery Judge to specialize in company matters and for one Queen's Bench judge to specialize in commercial matters. Also in England there is a system of Divorce Commissioners, whereby County Court judges are given High Court status as Commissioners for the purpose of trying certain divorce cases. In Scotland, the highest courts are divided into two sections:

- (i) the Court of Session (dealing with civil matters; and

- (ii) the High Court of Justiciary (dealing with criminal matters).

In the civil law systems of Continental Europe, it is quite common and, indeed, normal to divide the highest courts into sections and to have a substantial degree of specialization. In France, for example, there are separate courts for commercial cases and for administrative cases. The Court of Cassation sits in different Divisions or Chambers.

A family court system might be created to operate separate and distinct from the rest of the High Court. Under such a system, the senior judges of the family court system would be High Court judges, but such High Court judges would be detached from the rest of the High Court and would work exclusively in the family court jurisdiction. They would, of course, go on circuit and would perform the same functions as the senior judges proposed under Scheme A. One of the judges of the Family Division of the High Court would be the President of the family court system, and would be responsible for its organization and working.

Conclusions

It appears to the Family Law Project that Scheme A could be integrated most easily into the present system in Ontario, and that the setting up of a Family Division of the High Court would represent a somewhat abrupt change from the organization of the High Court in Ontario. As far as the judges of the court are concerned, under Scheme A the main problem lies in the method of appointment and status of the senior judges. The status of the junior judges does not much appear to present any problem, since it is covered by the provisions of the Provincial Courts Act, 1968. It is naturally the intention of the proposals under Scheme A that a family court system of the type described should form a permanent and important feature of the judicial system of Ontario. The senior judges of the family court system should be appointed as judges of the Divorce Division of the Exchequer Court under the new section 4A of the Exchequer Court Act. Under the new section 8 of the Exchequer Court Act (which is introduced by section 23 of the Divorce Act) provision is made for any judge of a Superior Court or County Court in Canada, and any person who has held office as a judge of a Superior Court or County Court

in Canada, to be appointed to act as a judge of the Exchequer Court and as a judge of the Divorce Division. Possibly this section is intended to cover temporary or ad hoc appointments to the Divorce Division of the Exchequer Court in a manner roughly analogous to the appointment of Divorce Commissioners in England. In addition, of course, it would be possible to have permanent appointments to the Divorce Division of the Exchequer Court (provided suitable amendments were made to the language of the statute). [See now Federal Court Act, R.S.C., 1970, c.10 (2nd Supp.)].

It would not seem desirable that the Federal appointments of senior judges should carry any implication that these are merely of a temporary or ad hoc nature. The senior judges of the new family court system should be appointed on a permanent basis both:

- (a) Federally, as judges of the Divorce Division of the Exchequer Court; and also
- (b) Provincially, as Provincial Judges (Family Division).

The junior judges of the new family court system would, of course, only be appointed as Provincial Judges (Family Division).

The adoption of Scheme A for the development of a Provincial system of family courts in Ontario would, it is hoped, provide a comprehensive, strong and specialized family court system, well-equipped with modern services. The system would combine a close contact with local areas (provided by regional court centres, presided over by junior judges) and also an important and well-equipped central headquarters on which would be based senior judges with both Federal and Provincial jurisdictions, who would travel on circuit to various centres throughout the Province. Such a system ought to have the ability to attract good people to it, both to the judiciary and to its various departments. This is vital, because the court will be no better than the people who work in it. It is important also for its success that the court system should be well-equipped, and supported by the Government and by the public. The Family Law Project would stress that it has no desire, in making these recommendations, to prescribe a final form for a family court system in Ontario. What is proposed is an organization

capable of working out its own development and self-improvement. If the system now recommended was initiated in Ontario, it is felt by the Project that, given proper support by the Government and people of Ontario, and given an appreciation by them of the importance of its functions, the proposed Ontario family court system would be able to give superior service to the community in a most important area." (572)

Unlike the Alberta and Ontario studies, the Working Paper of the Civil Code Revision Office on the Establishment of a Family Court in Quebec rejected the notion of a two-tiered system and favoured an autonomous Family Court of superior jurisdiction presided over by judges appointed by the Lieutenant-Governor and confirmed in their appointment by the Governor-General. This recommendation, if literally construed, flies in the face of the language of section 96 of the British North America Act, which provides that the "Governor-General shall appoint the judges of the Superior, District and County Courts in each Province...", but it is submitted that implementation of the substance of the recommendation would not necessitate amendment of section 96 if the federal and provincial authorities were prepared to act by way of joint consultation. The Working Paper of the Civil Code Revision Office also differed from the Alberta and Ontario studies by formulating proposals for the appointment of referees to assist the judges of the Family Court.

Commenting on the status and place of the proposed Family Court in the judicial structure, the Working Paper of the Civil Code Revision Office stated:

" The establishment of a single court with integrated jurisdiction in family law matters gives rise to serious constitutional problems related to the operation of the judicial system in Canada as set in place under sections 92, para. 14, and 96 of the British North America Act. Before considering the constitutional problem, it would be well to examine the different possible forms that could be given to this court, which should be a court of record .

Four such forms have been considered:

1. A court that would be either independent or a division of the Provincial Court or of the Social Welfare Court, family matters. The judges of this court would be appointed by the Lieutenant-Governor in Council.

2. A two-level court, one of higher and one of lower jurisdiction, including judges appointed by the Governor General in Council and other judges appointed by the Lieutenant-Governor General in Council, each exercising their powers within the limits of their constitutional attributions.

3. A court that would be either independent or a division of the Superior Court, with jurisdiction in family matters, to which judges would be appointed by the Governor General in Council.

4. An autonomous court the judges of which would be appointed by the Lieutenant-Governor in Council and confirmed in their functions by the Governor General in Council so as to confer upon them, in family matters, the jurisdiction of a Superior Court judge.

Each of these suggested solutions raises serious problems about appointment of judges and the jurisdiction that the Committee thinks it desirable to assign to the Family and Child Court. Being firmly convinced that all jurisdictions affecting the family must be integrated under the authority of one court, the Committee believes that the constitutional obstacles should not prevent the major reform of our judicial institutions urgently required in this field. ...

The federal Parliament already has absolute

control over the constitution and organization of its own courts. It seems to us that repeal of section 96 of the British North America Act would be a logical step. The federal authority ought to appoint the judges of the federal Courts, and the provincial authority ought to appoint the judges of the provincial Courts. Adoption of such an amendment would solve the problem of the appointment of judges to the Family and Child Court.

Another requirement is consent by the federal Parliament to grant jurisdiction to the court over certain crimes and certain civil matters such as divorce. To achieve this result, it would not of course be necessary to amend para. 26 and 27 of S. 91 of the British North America Act.

In Quebec, jurisdiction over family law, including young delinquents, could be entrusted to the Superior Court, the Provincial Court, to the Social Welfare Court or to an entirely new Court.

The Superior Court could well assume in this field jurisdictions which it does not now exercise. The constitutional problem regarding judicial appointments would then be resolved. Thus, a Family Division could be created, along the lines of the Bankruptcy or the Divorce Divisions of the Superior Court.

However, to meet the objectives set by the Committee, a Family Division should have its own judicial and para judicial services together with a procedure, suitable for family cases. It is extremely difficult to contemplate such a reform within the Superior Court, unless this Division is considered as an independent court, having distinct quarters and a distinct organization. Although in principle there would be nothing to prevent the institution of such a division that would meet the principal aims envisaged by the Committee, namely, specialization, greater humanity, and integration of other disciplines, the Committee feels that the proposed reforms are of too ample proportions to fit into the present Superior Court structure.

The Committee also feels that, from a strictly practical point of view, it would seriously complicate matters to lay yet more burdens on the Superior Court, thus increasing the number of cases that would have to be heard by it. Indeed, with an eye to the general picture of the administration of justice in the Province, care must be taken not to prejudice the considerable efforts expended during recent years to accelerate the hearing of cases, particularly just as it is beginning to produce results.

The creation of a Family Division in the Provincial Court would present the same difficulties.

Again it seems that a two-level court, of higher and lower jurisdictions is not an acceptable solution, as it would involve so many difficulties in practice that the end result would be a definite setback. It does not appear that within such a framework any integration would be possible between the work of the family judge and that of the child judge, and this the Committee thinks undesirable.

Finally, a court having two unintegrated levels, that is, the Superior Court, family division, and the Social Welfare Court as presently structured, is, of course, possible and would even constitute an improvement over the present system, but it would again fail to meet one of the main objectives of the reform, the integration of all family and child jurisdictions, and would jeopardize the attempt to find overall solutions to family problems.

The Committee believes that until such time as our court system is changed, it would be a definite advantage to make use of the Social Welfare Court organization, even if presently inadequate to the prospective duties of the Family and Child Court, and to adapt it gradually. It would be better to improve and complete the services of this Court than to attempt to integrate such services into the framework of the Superior Court or the Provincial Court and complicate their operations. We therefore propose that the Social Welfare Court be replaced by a Family and Child court, to be established by the National Assembly by amending sections 101 and following of the Courts of Justice Act, R.S.Q., 1960, c.20. The judges of the new court would be appointed by the Lieutenant-Governor in Council, but their appointment would be confirmed

by the Governor General in Council, so as to confer upon them the jurisdiction of Superior Court judges.

The Ontario Law Reform Commission, in its publication entitled 'Study of the Family Law Projects', favours the establishment of Family Courts, and recommends an analogous method for appointment of judges:

' To produce a desirable range of jurisdiction, it is recommended that the senior judges should be appointed after joint consultation between the Federal Government and the Provincial Government concurrently as:

1. - Judges of the divorce division of the Exchequer Court and
2. - Provincial judges (Family division).

The Committee, after having seriously weighed the advantages and disadvantages of each of the above-mentioned solutions, makes the following recommendations:

RECOMMENDATION # 9:

THE COMMITTEE RECOMMENDS THAT THE FAMILY AND CHILD COURT BE A COURT OF RECORD, AUTONOMOUS, WITH SUPERIOR JURISDICTION.

RECOMMENDATION # 10:

THE COMMITTEE RECOMMENDS THAT THE JUDGES OF THE FAMILY AND CHILD COURT BE APPOINTED BY THE LIEUTENANT-GOVERNOR IN COUNCIL AND THAT THEIR APPOINTMENT BE CONFIRMED BY THE GOVERNOR GENERAL IN COUNCIL SO AS TO CONFER UPON THEM, IN MATTERS OF FAMILY LAW, THE JURISDICTION OF A SUPERIOR COURT JUDGE.

RECOMMENDATION # 11:

THE COMMITTEE RECOMMENDS THAT THE SOCIAL WELFARE COURT BE ABOLISHED AND THAT ITS JURISDICTION BE INTEGRATED INTO THAT OF THE FAMILY AND CHILD COURT.

RECOMMENDATION # 12:

THE COMMITTEE RECOMMENDS THAT THE JUDGES NOW SITTING ON THE SOCIAL WELFARE COURT BE APPOINTED TO THE FAMILY AND CHILD COURT OR ASSIGNED TO OTHER JURISDICTIONS.

RECOMMENDATION # 13:

THE COMMITTEE RECOMMENDS THAT A FEDERAL-PROVINCIAL COMMITTEE BE FORMED TO CONSIDER NOMINATIONS FOR THE OFFICE OF JUDGE OF THE FAMILY AND CHILD COURT." (573)

And on the appointment and role of the referee, the Working Paper stated:

" The Committee has noted the stream of criticism characterizing the present system of investigating and hearing cases as plodding, inefficient and formalistic, and consequently time consuming and expensive for the parties, solicitors, judges and witnesses alike, and productive of much frustration to litigants who often must wait for hours for their turn to be heard. In family matters the criticisms are more bitter because of the very nature of the conflicts.

The Committee has attempted to formulate a plan to meet the following objectives:

1. Reduction in the degree of formalism surrounding the formal hearing and the use of the adversary system at the litigant's first encounter with the judicial system;

2. Fullest possible use of conciliation procedures at the stage of provisional remedies;

3. Hastening of the settlement of provisional and accessory remedies;

4. Administrative efficiency of the case hearing procedure;

5. Appreciable reduction of costs and more rational use of resources.

The Committee therefore makes the following recommendations:

RECOMMENDATION # 24:

THE COMMITTEE RECOMMENDS THAT THE FUNCTION OF REFEREE BE ESTABLISHED IN THE FAMILY DIVISION OF THE FAMILY AND CHILD COURT.

RECOMMENDATION # 25:

THE COMMITTEE RECOMMENDS THAT REFEREES BE CHOSEN FROM AMONG ADVOCATES AND NOTARIES WITH AT LEAST FIVE YEARS OF PRACTICE AND WHO ARE SPECIALISTS IN FAMILY LAW, AND THAT IN SELECTING THEM ACCOUNT BE TAKEN OF THE CANDIDATES' PERSONAL **QUALITIES** AND THEIR INTEREST IN FAMILY PROBLEMS. CANDIDATES' KNOWLEDGE OF FIELDS RELATED TO FAMILY LAW SHOULD BE TAKEN INTO CONSIDERATION.

RECOMMENDATION # 26:

THE COMMITTEE RECOMMENDS THAT THE REFEREE HEAR CASES OF PROVISIONAL REMEDIES IN FIRST INSTANCE, PARTICULARLY IN MATTERS OF FAMILY RESIDENCE, CUSTODY OF CHILDREN AND MAINTENANCE.

RECOMMENDATION # 27:

THE COMMITTEE RECOMMENDS THAT THE REFEREE ALSO HAVE JURISDICTION TO HEAR ON THE MERITS SUITS THAT ARE UNCONTESTED, BY DEFAULT OR EX PARTE, AND THAT FALL WITHIN THE JURISDICTION OF THE FAMILY DIVISION OF THE FAMILY AND CHILD COURT.

RECOMMENDATION # 28:

THE COMMITTEE RECOMMENDS THAT ANY INTERESTED PARTY BE ENTITLED TO PETITION THE COURT TO REVIEW ANY DECISION RENDERED BY THE REFEREE ON THE PROVISIONAL REMEDIES WITHIN FIFTEEN DAYS OF THE DECISION.

RECOMMENDATION # 29:

THE COMMITTEE RECOMMENDS THAT THE

REFEREE'S DECISIONS IN CASES THAT ARE UNCONTESTED, BY DEFAULT OR EX PARTE, NOT HAVE EFFECT UNLESS HOMOLOGATED BY THE COURT AND THAT THE PARTIES HAVE THE RIGHTS OF APPEAL FROM SUCH DECISIONS IN ACCORDANCE WITH THE ORDINARY RULES.

RECOMMENDATION # 30:

THE COMMITTEE RECOMMENDS THAT THE REFEREE BE IMMUNE FROM PROSECUTION FOR ACTS DONE IN GOOD FAITH IN THE PERFORMANCE OF HIS DUTIES." (574)

The place of the Family Court in the judicial structure was also examined in the Family Law Study undertaken in Newfoundland. It was therein stated:

" Ideally, the court to handle family law problems would be the Supreme Court of Newfoundland. The best system would be to appoint specialist judges to preside in a Family Court Division of the Supreme Court. The judges of the Family Court Division of the Supreme Court would be located permanently in other areas of the province as well as in St. John's. All family law matters could then be placed within the Supreme Court and there would be no constitutional difficulty.

If it is considered impracticable to have the Supreme Court hear all family law matters then an alternative could be considered. The District Courts could be given complete jurisdiction in family law matters and the Family Court could be a division of the District Courts. The judges of the District Courts are all lawyers and they are situated throughout the province. For these reasons this court, with a modest addition to its numbers, may be the most appropriate to deal with family law. Because the District Court judges are federally appointed it may be constitutionally possible to give these judges jurisdiction in divorce by making them judges of the Supreme Court for purposes of divorce proceedings. If this is found to be impracticable, consideration could be given to a reference system under which the

Supreme Court would decide the question of divorce and refer matters of corollary relief to the Family Court Division of the District Court." (575)

In contrast to the aforementioned provincial studies, wherein it is recommended that the Family Court should be a court of superior jurisdiction, either **autonomous** in character or integrated in the existing Supreme Court structure, Judge H.A. Allard has suggested that serious consideration should be given to the **possibility** of the jurisdiction and improving the status of the existing Family and Juvenile Courts that currently exercise jurisdiction in matrimonial, familial and juvenile proceedings. He has stated:

"F. THE FAMILY COURT AS A SUPERIOR COURT

If in weighing the issues about structure, the decision is made that what is needed is one court, the question then is, at what court level will family matters be consolidated; that is, in the superior court or a lower court, or a combination of them? It can be argued that for constitutional reasons, the superior court is the only court that can encompass all Family Court matters. Such arguments suggest that only the Supreme Court can enter the field of divorce, and therefore all other matters should be brought to this Court as otherwise divorce would be excluded from a consolidated Family Court. Surely this should not be a deciding factor in respect of such an important area of social policy. The Federal Government, in co-operation with the provinces, readily provided devices for the bringing of all matters affecting juvenile delinquency into a special type of proceeding, and their removal from the criminal courts. Many of the implications of the Federal Juvenile Delinquents Act were of a welfare nature and the prerogative of the provinces. An enlightened Federal Government and co-operative provincial governments could readily provide devices to overcome constitutional rigidity if this was seen as desirable.

The arrangement supported by the Ontario Law Reform Commission, Family Law Project, is as follows:

'To produce a desirable range of jurisdiction, it is recommended that the senior judges should be appointed after joint consultation between the Federal Government and the Provincial Government concurrently as: (1) judges of the Divorce Division of the Exchequer Court and (2) as Provincial Judges (Family Division). The senior judges would have the power to try those family law cases which presently lie within the jurisdiction of High Court Judges in Ontario, for example, divorce cases. This would mean that actions of divorce and proceedings for declaration of status (including property questions, assessment of balancing claim, and questions associated therewith, which will arise if effect is given to the recommendations already made by the Family Law Project Property Study) will be tried by senior judges.

In result, therefore the family court system for Ontario would include the following subjects in its exclusive jurisdiction : divorce; proceedings for declaration of status (including property and financial questions associated therewith); the present topics under the Child Welfare Act (i.e., neglected children, children of unmarried mothers, adoption); guardianship and custody (whether or not connected with divorce proceedings or proceedings for declaration of status); delinquency; the enforcement of maintenance obligations; family criminal matters (such as assault by one spouse on the other.)'

The difficulty is that this arrangement in many ways merely perpetuates the division of matters and may be one court in name only. The projection is that the senior judges would hear divorce matters and the junior judges the cases now heard in Family Court. The problems of differences in appointment, status, and salary would suggest a relegation of the most numerous and most important human problems such as wardship care of children to a position of inferior priority. This difficulty however is not insurmountable.

The question to be resolved is where best may family law matters be heard and in what manner? The required social approach, or to provide a uniform philosophical practice. If one examines the American experience where the Juvenile and Family Court is part of a Superior Court system, there are few advantages and many disadvantages. The advantages would appear to be that the Court has high status, that there are minimum standards for appointments to the Bench, and that the total operation better commands community support as the structure and status is an indicator of importance and confidence. The problems are, however, that family matters become merely an attachment to a court system which views other matters as of higher priority. The judges usually are appointed to the Family Court on a rotation basis so that no judge becomes expert by a career involvement. Judges are therefore not chosen for any special interests in family matters; there is less communication between staff and the judge in such a hierarchy and such a system has given little or spasmodic support to specialized social approaches. However, in contradiction to the general pattern, 30 to 40 superior courts have developed comprehensive services of a unique nature, marked by devoted career judges, competent permanent staff of highly-trained referees and counsellors and a wide variety of social work facilities. Some superior courts have been reluctant or unable to adjust to simple procedures and as a result of the high volume of cases they have created devices whereby in fact most of the delinquency and many of the child protection cases are resolved by deputies or referees. A peculiar American problem is the advent of jury trials for juveniles. This has been a further pressure for informal adjustment. It has proven to be difficult to encompass the great majority of juvenile and family court cases in a superior court context. To burden a superior court with child welfare enquiries, juvenile delinquency cases ranging from traffic violations to chronic offenders, and common assault complaints between family members, would appear to be inappropriate. Some 'alarming' delinquencies claim the attention of the superior courts, but consistent acceptance of the importance of children's cases is lacking. American experience has shown a wide gulf between the court and child welfare services in particular. This may be because welfare services are the furthest removed from the court's usual

concerns of civil matters and serious offences against the state. An appraisal of such relationships is given in the Utah Law Review as follows:

'A Family Court Structure established in the State of Utah was unsuccessful and one of the main reasons for this lack of success was stated to be the fact that the marriage counselling services and other welfare services which the court used were provided by the State Department of Welfare and were not under the control and direction of the court.'

There are, of course, many variations in opinion and practices in the United States. New Jersey, for example, has devised a system of court reconciliation masters. These 'standing masters' need not be members of the bar, but are trained in marriage counselling. The Conciliation Court of Los Angeles County is well known especially for its use of Reconciliation Agreements. In that structure the judge supervises and participates in all the functions of the Court. The judge reviews Reconciliation Agreements and directs compliance with the agreements where required. It is interesting to note that this Court does not hear children's cases and that in 1956 out of 31,871 divorces only 1,580 were referred to the Reconciliation Court.

Canadian superior courts to this date have rarely been prepared to adapt any of the American innovations or make use of the services available in the lower courts of a social welfare nature. A notable exception is Ontario where reports are routinely required as to arrangements for care of children in matrimonial cases. Divorces are heard in open court; custody and other reports, when given, are given in open court, and only a handful of cases in the whole of Canada have been referred for counselling. Family matters such as divorce, separation and custody remain traditional adversary procedures conducted under established rigid rules of evidence and follow traditional dispositional patterns. Judges rotate so there is little case continuity in children's cases, and where continuity is sought, there are lengthy delays.

G. THE FAMILY COURT AS A LOWER COURT

The Canadian Family Court must be viewed in the light of many years of experience in the Lower Court setting where most cases concerning families are heard. These Courts have demonstrated an interest in specialized approaches, in supporting career staff of a special competence, and have devised systems to hear complex issues in an expeditious manner. Such a Lower Court, however, must have enhanced status, and the importance of the orders which it makes in respect of the care and control of children and in respect of family life must be recognized. Just as it might be considered an inferior attachment to the Higher Court, it must not be viewed as an inferior Lower Court or have inferior divisions in its own specialization. Delinquency and neglect matters are inseparable from Family Court matters, in a unified court, and an appropriate consolidation would have to consider the importance of these proceedings, which represent about two-thirds of family related matters now before the Courts. The proportion of cases can be illustrated from the Dominion Bureau of Statistics figures for all of Canada in 1967 which show 30,963 delinquency cases and 7,925 Deserted Wives' and Children's Maintenance Act cases; child welfare figures on the national level are not so readily available; however, in the City of Calgary Juvenile and Family Court distribution for 1969 was 1,240 family cases, 1,391 juvenile delinquency cases and 1,238 child protection cases. These figures also do not take into consideration the large number of delinquency cases referred to the Court and dealt with on an out-of-court basis through the intake process. These totals may be contrasted in the record high of 11,165 divorce cases heard before the Supreme Courts in 1967. In some jurisdictions, children's cases represent 80 to 90 percent of the work volume.

The Lower Court has established relationships with a wide variety of supportive agencies such as private family counselling agencies, children's aid societies, treatment centres, detention and shelter facilities. This is not to suggest that a Family Court could not improve such relationships just as it must improve its communication with the legal profession. The ideal Lower Court would be a Family Court having a broad jurisdiction,

but not all inclusive, in which the judges become expert by full-time assignment to that Court and by further training after appointment. Such judges should be chosen for their special personal qualities and competence for the specialized task. Such a Family Court would balance legal rights and due process with knowledge gained from the behavioural sciences and with knowledge of the community at large." (576)

The views of Judge Allard are shared by Judge David M. Steinberg in his Preliminary Report on the Drafting of Model Unified Family Court Legislation, which was prepared for the Family Law Project of the Law Reform Commission of Canada. This report is essentially an analysis of opinions expressed by the Canadian judiciary respecting the concept of a unified Family Court. In the report Judge Steinberg formulated the following conclusions respecting the status of such a court and its place in the judicial structure:

" If one can ascertain a majority view from the responses which I have received from our Judiciary, it is that it is desirable that one Court should have a comprehensive jurisdiction over all matrimonial matters. (This was virtually the unanimous view of the Provincial and County Court Benches. If one includes the critique of the Judges of the Supreme Court of Alberta of the Alberta Law Reform Institute Working Paper, this was the minority view of those Supreme Court Judges responding.)

There was however considerable disagreement concerning the feasibility of such a Court at this time or if it was feasible, its mode of implementation. Left unresolved were such questions as: Should for example, the Unified Family Court be structured at a Supreme, County or Provincial Court Level, or in the alternative should a tiering system be operative with each of the above mentioned Courts playing a limited or duplicative part? Would the Provincial Courts be able to assume a significant role in the Unified Family Court concept and would many of the Provincial Judges unable by reason of lack of legal training to accept the proposed added responsibilities?

If this report serves any purpose, it may be to show that these unresolved issues are incapable of being answered in the abstract and that only trial and error experience will yield results and data which can enable our legislators to plot a proper course. The question remains - where and how does one begin to test?

It is the view of this writer that, if at all possible, an attempt should be made to structure the Unified Family Court around the existing Family Courts and for this main reason: the essential element of such a Court would be its resource divisions and their ability to adjust to local problems. I do not believe, based upon past history that any Bench organized at the Supreme or County Court level would be able to develop and maintain any such resource.

It would appear that the only Bench which has made any significant attempt to incorporate social resources into the litigation of Family problems has been the Family Court Bench. The failure of the Supreme (and in some cases the County) Benches to initiate any programmes so as to implement the philosophy of s. 8 of the Divorce Act speaks for itself - it was left to a Family Court Judge, Judge Bowker, to do something about the vacuum between that legislation and the implementation of its philosophy.

Throughout this Country there are many Family Courts which have successfully developed their own systems of counselling and investigation - it is the Judges of those courts who have the expertise to develop the necessary resources. The core of the philosophy the Unified Family Court, the resource division, would not be capable of implementation by any other Bench than that analogous to the existing Family Courts.

Some argument might be advanced that the existing Family Courts could perform the function of assembling and administering the resources within a tiered system. That compromise approach which has been suggested envisages one Court composed of Federal and Provincial Judges, each exercising those powers that are within their constitutional competence.

The writer rejects this approach. To develop a Family Court along those lines is to continue the duplications and inequities of the present system.

For example, the alternative model suggested in the brief of the Ontario County Court Judges provides for maintenance under the Deserted Wives' and Children's Maintenance Act to be dealt with in Family Court - but that the issue of custody be in the County Court.

Such an approach must of necessity require two trials for a wife seeking custody and maintenance for her children. This achieves nothing but further frustration, time waste and expense to weary litigants.

The two tiered approach has been tried in British Columbia by virtue of the recently enacted Family Relations Act. In January 1973 I wrote to the Law Reform Commission of British Columbia enquiring as to the workability of the System. On February 5, 1973 I received the following reply from Commissioner Lyon:

'In reply to your letter of February 1st I must admit that I do not know, from personal experience, how the two-tier system is functioning in this Province. I do know, however, that none of those who are involved in the administration of family law is happy with the present situation.

I am just this week starting consultation with judges, lawyers, and other persons involved in family court in order to try to get some idea of what the main problems are and how we may best proceed toward a unified family court system. We are hoping to get approval from the Attorney-General for a feasibility study on a pilot project, the purpose of which would be to create an artificial comprehensive jurisdiction in one area of the Province in order to experiment with the organization and allocation of the various resources of a family court system.'

On April 19, 1973 I received a further reply from Commissioner Lyon as follows:

' You are free to use my earlier letter concerning Family Court as you wish. However, I think you will be interested in knowing that we have advanced somewhat in this area and I attach a brief description of the pilot project we are in the process of designing. My own hope is that we will see a unified Family Court go ahead on a pilot project basis in British Columbia sometime next fall. However, you should know that I am noted for my optimism.

In any case, we have [now] moved to the operational level and have involved the people who actually administer family law. I think this in itself is an important advance.'

A description of the Family Court Pilot Project is Appendix #5 to this report.

It is therefore the recommendation of this report, that attempts be made to structure a Unified Family Court at a lower Court level, analagous in status to the existing Family Courts in Canada.

The adoption of this approach must overcome two rather large obstacles.

In order for a provincially appointed Family Court Judge to exercise a complete jurisdiction in a Unified Family Court, he must be given Superior Court Jurisdiction by the Federal Government, and secondly there is a lack of adequate Family Court systems in many provinces or areas therein.

In a number of provinces the existing Family Courts are in an embryonic stage and even in those Provinces where they exist in a more developed stage there have been many views expressed that many of the Court Judges therein may not be capable of assuming expanded jurisdiction to the extent required under a Unified Family Court Concept. This is a legitimate concern especially in those jurisdictions where non-legally trained Judges have been appointed.

A lack of legal training would appear to inhibit or restrict a non-legally trained Judge from dealing with such matters as:

1. Proceedings under the Married Woman's Property legislation especially as they relate to partition and sale of matrimonial property.
2. Those corollary relief provisions providing for the securing of maintenance.
3. Matters involving the validity of marriage and conflict of law.
4. The exercise of equitable jurisdiction especially in those cases requiring injunctive relief.
5. The exercise of chancery jurisdiction as it relates to questions of custody of children.

Concern should also be held as to the difficult role of the Family Court Judge in his relationships with the proposed resource divisions of the Court. It is suggested that there is a real danger of a non-legally trained Judge over-relying upon his social service resource. Legal training might be essential to the Judge to enable him to assume a judicial stance in his relations with those resources, so as to be able to work with them and rely upon them, but at the same time, take a critical objective view of them.

There is also the point of view expressed that the Unified Family Court concept can never be accepted and be implemented unless it has the full acceptance of the bar and the Superior and County Benches, and this will never happen at the existing Family Court Level until the Bench of that Court is fully legally trained.

These defects of the Family Courts, while in many cases valid, are either being remedied or are capable of remedy.

The Family Court has had a fairly short history and can be said to be in a state of evolution. In its original concept the Judge was supposed to be half social scientist and half legalist. It is generally conceded that this dual role is impossible to exercise.

The general view of the Family Court Judge is that he must be a Judicial (as opposed to a social scientist) entity. His status must be that of a legalist who draws around him community resources who will assist him to resolve legal problems according to the social and legal needs of the litigants before him. To adopt a non-judicial stance in the Courtroom leaves a Judge without rules to conduct his case by and leaves the litigants at the mercy of the social and moral values of the Judge. It would appear that the vast majority of recent appointments to the Family Court Benches have been legally trained persons and that our governments have endorsed the view that the primary function of the Family Court Judge is that of a legal officer.

If there is a resistance by Superior Court Judges to further development of the Family Court it may be because the Judges of the Superior Courts have not had sufficient contact with the Family Courts at this point in time. The vast majority of appeals from the Family Court now go before the County Court Judges on a trial de novo. This has been very unfortunate because it has resulted in a lack of jurisprudence flowing from the Family Court in a sense that the Courts of Appeal of our country have never had a real opportunity to review the decisions of the Court. The elimination of the trial de novo appeal, which has been advocated by a number of responses, appears desirable and easily achieved.

A further contributing factor in the lack of development of the Court is that until recently most Courts have been administered municipally and not provincially and this has resulted in an uneven growth of the Courts.

Pursuant to the above comments it is the recommendation of this report that the following approach should be adopted, where possible, by the Federal Government and each province.

(1) There should be a commitment by each province that it will allow its Family Court to develop to its maximum potential, by granting to it the maximum jurisdiction extendable by the province. Correspondingly the Federal government should commit itself to ultimately investing Federal jurisdiction in Family matters in the

Provincial Benches once it has been demonstrated that such Benches are capable of accepting the responsibilities and authority.

(2) It is submitted that as soon as possible the Family Courts in each province be invested with jurisdiction by their respective Provincial governments, as follows:

- (a) To grant orders for maintenance of spouses and children.
- (b) To grant separation orders.
- (c) To make orders respecting possession of family residences and chattels.
- (d) To grant orders of custody and access (and not ancillary to the granting of any order).
- (e) To make provision for conciliation proceedings as an inherent procedure of the Court process.
- (f) To have the power to enforce and vary separation agreements.
- (g) To make provision for the maintenance and custody of illegitimate children.
- (h) To make provision for dependents of deceased persons under the Dependent's Relief Legislation.
- (i) To deal with matters involving wardship and adoption.
- (j) To provide for affiliation orders.

It is the view of this writer that the Provincial Courts are constitutionally capable of accepting each of these powers, many of which are now contained in the Manitoba Wives' and Children's Maintenance Act (Appendix # 6) and in the Draft Family Relations Act (Ontario) (Appendix #2).

(3) It would be incumbent upon each Provincial Legislature to withdraw from the Superior Courts of their province alimony jurisdiction, custody jurisdiction, and such other jurisdiction within Provincial competence as would conflict with the jurisdiction of the Family Courts.

(4) The Federal government should commit itself to transferring to individual Courts, as they develop, the jurisdiction now granted to some County Courts under Divorce.

(5) (In the absence of the implementation of point (4)) It would be contemplated that all maintenance orders for spouses made by a Family Court would survive a Divorce decree unless such orders were varied, amended or supplanted by the Divorce Court.

(6) All appeals from the Family Court should be heard by either a Supreme Court Judge in Chambers or a Provincial Court of Appeal and not be trial de novo hearings before the County Court Judges.

(7) The Provincial Legislature should commit themselves to improving the facilities of the Family Courts and to appointing to that Court only legally trained Judges. Family Court Judgeships should be made attractive enough to competent lawyers.

(8) It should also be expected that the Family Court Benches of the provinces be divorced from their criminal counter-parts and that Family Court procedure be independent from summary conviction procedures. Such new Court procedures should include, where applicable, pre-trial procedures such as discoveries and interim relief, etc.

This approach to the problem avoids the danger of attempting to push forward the existing Family Divisions too far too fast and in the end creating nothing but a compromise which would continue the existing difficulties.

The solution proposed by the writer is not to abandon the Unified Family Court concept, but rather to strengthen the existing Family Courts in order to evolve to a point where they could accept the jurisdiction of a Superior Court.

The Federal government would have a significant role to play in the further development of the existing Family Courts in the following areas:

(1) The end result of expanded jurisdiction may be that Superior Courts in their Divorce jurisdiction will rely upon the Family Court Judges for the implementation of custody and maintenance arrangements in divorce under the Provincial jurisdiction rather than invoke the corollary relief provisions in the Divorce Act.

This would be a hopeful development. It should be noted that at the present time in Ontario a great number of Divorce orders are enforced in the Family Court. This leads to great complications since the Family Courts are called upon to enforce orders but are not given varying powers.

(2) If the above is desirable and if the end results of greater reliance upon the Family Courts is to relieve the burden of the Superior Courts then the Federal Government may wish to make substantial contributions to the salaries of the Provincial Judges as well as to the financing of the Courts. This is especially so, since the end result of this expansion process would be the granting of full Superior Court jurisdiction upon the Family Court Judge." (577)

Between the two extremes of establishing specially constituted Family Courts of superior jurisdiction or conferring a more comprehensive jurisdiction upon the existing Juvenile and Family Courts, there is a middle ground that has been advocated, namely, that jurisdiction in matrimonial, familial and juvenile proceedings should be divided between the Supreme Court and the Juvenile and Family Courts, the former court being reorganized so as to admit a Family Division. This compromise solution was favoured in a submission of the County and District Judges Association of Ontario to the Ontario Law Reform Commission. It is therein stated:

"1. Our Recommendation

The main recommendation in our submission dated March 25th, 1971, to the Ontario Law Reform Commission on the structure of the courts in Ontario was:

'Consolidate the present High Court and County Courts into one province-wide Superior Court, presided over by Superior Court Judges.'

If our recommendation for merger is accepted, it is our further recommendation that three main divisions of the Superior Court be established, namely, the Criminal Division, the Civil Division and the Family Division, each division to be headed by a Presiding Judge under the Chief Justice of the Superior Court of Ontario.

Judges of the Superior Court would be assigned to one of the three Divisions by the Chief Justice, assisted by a Court Administrator and a staff and supported by a Committee of Judges. While some Judges would probably become specialists and remain in one Division, others would act from time to time in two or all three Divisions. There would be both resident, and Judges at large. ...

The jurisdiction of the Family Division of the Superior Court would be the same as the Family Division of the High Court of Justice proposed in our alternative recommendation hereunder.

2. Alternative Recommendation

If merger is not accepted, as an alternative, it is recommended:

(1) That there be constituted a Family Division of the High Court of Justice consisting of the Local Judges of the High Court to be known as The High Court of Justice (Family Division).

(2) That all original jurisdiction in such matters be divided between such Court and the present Provincial Court (Family Division).

(3) That the Provincial Court retain all its present jurisdiction except in respect of custody under the Deserted Wives' and Children's Maintenance Act, and that it be given jurisdiction in respect of certain matters which are presently in the County Court judges.

(4) That appeals from orders of the Provincial Court lie in the first instance to the Local Judges of the High Court (Family Division) on the record with a further appeal to the Divisional Court and/or to the Court of Appeal.

The jurisdiction in matrimonial and family causes would then be vested in and divided between the two courts, as follows:

PROVINCIAL COURT (FAMILY DIVISION) -
sole jurisdiction under or in respect of:

(1) Sec. 17(2) of the Provincial Courts Act, i.e. to try juveniles under the Juvenile Delinquents Act (Canada), to try any child charged with an offence against the laws of Ontario and otherwise deal with all cases where jurisdiction is conferred by any Act upon a juvenile court or a judge thereof or upon a provincial court (family division).

(2) The Child Welfare Act, ie. in respect of neglected children, illegitimate children and adoption which is presently vested in the Supreme Court and the county court.

(3) The Deserted Wives' and Children's Maintenance Act, except with respect to custody.

(4) The Parents' Maintenance Act.

(5) The Children's Maintenance Act.

(6) To make an order dispensing with

parental consent to the marriage of a child under age which is presently vested in a county judge by sec. 9 of the Marriage Act.

(7) From any order made in respect of such matters an appeal shall lie on the record to a Local Judge of the High Court of Justice (Family Division) with a further right of appeal to the Divisional Court and/or the Court of Appeal.

THE HIGH COURT OF JUSTICE (FAMILY DIVISION)

(A) - In Court
(By Action)

Sole jurisdiction under or in respect of:

- (1) The Divorce Act (Canada)
- (2) Matrimonial Causes Act (Ontario)
- (3) Alimony

(B) -By the Local Judge
(Sitting in Chambers and upon originating notice of motion)

Sole jurisdiction under or in respect of:

(1) Custody and maintenance of children which is presently vested in the Provincial Court (Family Division) under the Deserted Wives' and Children's Maintenance Act; a Supreme Court Judge under the Infants' Act; and a Surrogate Court Judge under the Infants' Act.

(2) The Dependants' Relief Act.

(3) The Partition Act.

(4) The other matters under the Infants' Act such as the sale or lease of estates and marriage settlements which are presently vested in the Supreme Court and in guardianships which are now in the Surrogate Court.

(5) Sec. 12 of the Married Women's Property Act.

(6) Orders under Sec. 11 of the Marriage

Act declaring that a spouse shall be presumed dead.

(7) With an appeal from orders in respect thereof to the Divisional Court and/or the Court of Appeal.

NOTE:

When a custody application is pending before the Local Judge concurrently with a divorce action in which custody is claimed in the High Court of Justice (Family Division) the custody application will be transferred to the Court.

And likewise if an application is pending under the Partition Act or under Sec. 12 of the Married Women's Property Act concurrently with a divorce action the application may be stayed (578) or transferred to the High Court (Family Division)."

Faced with such super-abundance of alternatives respecting the status and place of the Family Court in the judicial structure, it may be appropriate for this writer to express his personal preferences. It is submitted that comprehensive jurisdiction over matrimonial, familial and juvenile proceedings should be consolidated in a Family Court of superior jurisdiction. This court should be a Division of the Superior or Supreme Court and should not be a separate autonomous court (579), although it will probably be necessary to provide a separate plant for the Family Division in order to accommodate its total resources, which should not be geographically fragmented. The judges should be appointed, after joint conciliation between provincial and federal authorities to the Superior or Supreme Court of the Province and not specifically to the Family Division of such court. Assignment of judges to the Family Division should be made by the Chief Justice of the Superior or Supreme Court. (580) To assist the judges in the disposition of proceedings, legally qualified referees should be

appointed. The functions of the referee would be twofold: (i) to finally determine the issues in designated proceedings; and (ii) to submit recommendations and reports to the trial judge of the Family Division for final disposition of those proceedings wherein delegation of a final decision to the referee is deemed inappropriate or constitutionally impermissible.⁽⁵⁸¹⁾ Appeals from decisions of the judges of the Family Division should lie directly to the Court of Appeal of the province but appeals from a final decision of a referee should initially lie to a single judge of the Family Division and thereafter to the Court of Appeal.⁽⁵⁸²⁾

Although this writer has indicated his personal preferences respecting the status and place of a unified Family Court in the judicial structure, they must be interpreted in light of the fact that a single composite solution may fail to reflect the needs of all provinces or even regions within the same province and total uniformity on a national scale, though attractive in theory, may be impracticable, undesirable and unnecessary. For example, the opinions of this writer might prove to be acceptable and capable of implementation without undue difficulty in those provinces wherein Family Courts have not been established, or, if established, exist only on a limited basis or in an embryonic form. On the other hand, the opinions of this writer may prove to be totally unacceptable and be deemed incapable of effective implementation in those provinces, e.g., Ontario, wherein a substantial network of Juvenile and Family Courts is well established. In these provinces, there

may be much to be said in favour of consolidating and expanding the jurisdiction of the Juvenile and Family Courts, in so far as this is possible within the current constitutional framework, with due regard to the ultimate possibility of converting such courts into courts of superior jurisdiction.

THE ROLE, QUALIFICATIONS, TRAINING AND TENURE OF JUDGES
IN THE FAMILY COURT

Consistent with the characterization of the Family Court as a court of law,⁽⁵⁸³⁾ it is submitted that the role of the judge or referee is that of an official arbiter and this role must not be subverted or imperilled by any direct involvement in counselling procedures.⁽⁵⁸⁴⁾ Although judges of the Conciliation Courts, as distinct from the more traditional Family Courts, in the United States discharge certain responsibilities that are inter-related to the counselling and conciliation process,⁽⁵⁸⁵⁾ the consensus of opinion asserts that judges should not become actively involved in counselling the parties. Thus, in a Report of the Subcommittee on the Conciliation Court of Los Angeles County, California, to the Matrimonial Actions Committee of the Family Law Section of the American Bar Association, it is stated:

"A forward-looking and well-intentioned court, recognizing a need and duty to combat the ever-rising incidents of divorce, will assign a judge or judges to institute reconciliation procedures, only to find that their well-intentioned attempts end in frustration and failure. Judges have neither the time, training or experience, except perhaps in some rare cases, to effectively counsel couples with marital problems. In fact, it would be far better to never attempt any such program because by its inevitable failure the whole concept of courts of conciliation is discredited and sets back for years the establishment of a properly conceived and operated conciliation court. ...

Marriage counseling should not be performed by the Judge but by trained and experienced counsellors under his direct supervision. ...

Although the Judge should rarely participate in any of the counseling procedures, he should see each reconciled couple, after they have been reconciled by the counsellor, to congratulate them and to impress upon them that the success of their marriage is of considerable concern to the court and the community." (586)

In determining guidelines respecting the qualifications, training, and tenure of judges or referees of the Family Court, the writer proposes to cite the conclusions and recommendations formulated in the Working Paper on Family Court prepared by the Institute of Law Research and Reform, Alberta, and will then examine specific aspects of those conclusions and recommendations in greater detail. In order to put the conclusions and recommendations of the Alberta Working Paper in perspective, it should be recalled that the Institute of Law Research and Reform envisaged the possibility of a two-tiered court system, the first tier being presided over by federally appointed judges with a comprehensive jurisdiction over all matrimonial, familial and juvenile proceedings, the second tier being presided over by provincially appointed judges whose jurisdiction would be circumscribed by the limitations imposed by the Constitution. (587) The Working Paper stated:

"E. Qualification, Training and Tenure of Judges

We believe that the court which administers Family Law should be a specialized court. We believe that the members of the court should give their full attention to the administration of Family Law.

We recommend against appointments to the court for a fixed term. We recommend against a system of rotation whereby judges from other courts spend some time in the Family Court. We believe that the appointments should be

permanent appointments, though, in so saying we are not suggesting that a judge of the Family Court should not by reason of being a member of the Family Court be unavailable for appointment to another court. We believe that any other system would not encourage the special training and long-term specialization in Family Law which, as we have said, we consider necessary.

Judges of the Family Court should be of great capacity. They should have a special desire to take part in the important work which the court will be doing, and they should so far as possible have some special experience in the field and special ability to understand both the legal principles and social factors involved.

We recommend that, except for existing Family Court judges, provincially appointed judges of the Family Court should be members of the Bar. We do not recommend that the legislation go further than this in specifying legal qualifications for the provincially appointed judges.

We point out the need of salaries adequate to attract highly qualified members of the Bar. We believe it unwise to rely upon the availability of persons so highly motivated that they are prepared to make substantial financial sacrifices to become members of the court. We would not wish to restrict the appointment of provincial judges of the Family Court to those who will make great financial sacrifice and those who could not command substantial incomes elsewhere.

The Judges' Act, section 3, requires that a judge appointed under the Act be 'a barrister or advocate of at least ten years' standing at the Bar of any province.' If the Family Court is to be composed of federally and provincially appointed judges, we do not recommend a change in the legal qualification of federally appointed Family Court judges to deal with the special case of the Family Court.

We recommend that there be no specific legal qualification for part-time Family Court judges. The requirement that a part-time judge be a member of the Bar would be likely to defeat the goal of such appointments. Sparsely populated and isolated areas may very well not have a member of the Bar available to them.

RECOMMENDATION #6

(1) THAT JUDGES OF THE FAMILY COURT BE GIVEN PERMANENT APPOINTMENTS AND NOT APPOINTMENTS FOR FIXED TERMS OR BY ROTATION FROM OTHER COURTS.

(2) THAT JUDGES OF THE FAMILY COURT BE PERSONS OF THE GREATEST POSSIBLE CAPABILITY, INTERESTED IN THE FIELD OF FAMILY LAW AND WITH EXPERIENCE IN IT.

(3) THAT SALARIES OF PROVINCIALY APPOINTED FAMILY COURT JUDGES BE SUCH AS TO BE ATTRACTIVE TO HIGHLY QUALIFIED MEMBERS OF THE BAR.

(4) THAT EXISTING FAMILY COURT JUDGES BE ELIGIBLE FOR APPOINTMENT TO THE PROPOSED FAMILY COURT WHETHER OR NOT THEY ARE MEMBERS OF THE BAR.

(5) THAT, EXCEPT FOR EXISTING FAMILY COURT JUDGES, PROVINCIALY APPOINTED FAMILY COURT JUDGES BE MEMBERS OF THE BAR.

(6) THAT IF THE FAMILY COURT IS COMPOSED OF FEDERALLY APPOINTED JUDGES AND PROVINCIALY APPOINTED JUDGES, THE FEDERALLY APPOINTED FAMILY COURT JUDGES HAVE THE QUALIFICATIONS REQUIRED BY THE JUDGES' ACT.

(7) THAT THERE BE NO 'PRESCRIBED LEGAL QUALIFICATION FOR PART-TIME FAMILY COURT JUDGES APPOINTED BY THE LIEUTENANT-GOVERNOR IN COUNCIL.

We believe that it is highly desirable that a Family Court judge, whether provincially or federally appointed, should receive extensive training and education following his appointment. The training might well include a period of sitting with an experienced judge. It might also include a very extensive program of a more academic type which might be made available through the university or elsewhere. We do not believe that we should go into the detail of such programs. We do recommend that the Attorney General acting in cooperation with the Minister of Justice should appoint a committee to consider the matter and to advise as to the type of training and education which would be desirable and the means of providing it.

RECOMMENDATION #7

(1) THAT FAMILY COURT JUDGES, WHETHER PROVINCIALY OR FEDERALLY APPOINTED, UNDERGO EXTENSIVE TRAINING AND EDUCATION FOLLOWING THEIR APPOINTMENT.

(2) THAT THE ATTORNEY GENERAL ACTING IN COOPERATION WITH THE MINISTER OF JUSTICE APPOINT A COMMITTEE TO CONSIDER THE MATTER AND TO ADVISE AS TO THE TYPE OF TRAINING AND EDUCATION WHICH WOULD BE DESIRABLE AND THE MEANS OF PROVIDING IT.

We believe it essential that the judges of the Family Court, like other judges, be given security of tenure. We do not believe that the reasons for this recommendation need be stated here as they are the reasons which apply to security of tenure of judges generally.

Since the Family Court is to be a superior court, the provisions of the British North America Act and of the Judges' Act relating to the security of tenure of superior court judges and the procedures for dealing with complaints against superior court judges would apply to federally appointed judges of the family Court, and we believe that they should apply.

We believe that the provisions of the provincial Judges' Act relating to tenure of provincial judges and investigation of complaints should also apply.

RECOMMENDATION #8

(1) THAT THE PROVISIONS OF THE BRITISH NORTH AMERICA ACT AND OF THE JUDGES' ACT RELATING TO TENURE OR SUPERIOR COURT JUDGES AND INVESTIGATION OF COMPLAINTS SHOULD APPLY TO FEDERALLY APPOINTED JUDGES OF THE FAMILY COURT.

(2) THAT THE PROVISIONS OF THE PROVINCIAL JUDGES' ACT RELATING TO SECURITY OF TENURE OR PROVINCIAL JUDGES AND INVESTIGATION OF COMPLAINTS, OR SIMILAR PROVISIONS SHOULD APPLY TO PROVINCIALLY APPOINTED JUDGES OF THE FAMILY COURT." (588)

For the purpose of discussing and evaluating the above conclusions and recommendations, it is appropriate to sub-divide the issues under the following sub-headings:

1. General attributes of the judge.
2. Professional training and qualifications.
3. Specialization, term appointments and rotation of judges.
4. Salary and security of tenure.

1. General attributes of the judge

Although legislation rarely seeks to define the desirable attributes of the judge of the Family Court, ⁽⁵⁸⁹⁾ studies and reports have devoted some attention to this matter. In an early report of the United States Department of Labor, it was stated:

" The position of judge of a family court requires qualities of highest order; Broadmindedness, executive ability, tact, knowledge of the law, knowledge of the principles governing social work, and knowledge of people. To these must often be added the ability to convince appropriating authorities and the general public that sufficient funds must be made available. These specifications are rarely filled." (590)

Adverting to the specifications set out in Standards for Juvenile and Family Courts, (591) a subsequent report of the United States Department of Health, Education and Welfare, Elizabeth D. Dyson and Richard B. Dyson have observed:

" It is generally agreed that 'selection of a competent judge who can give leadership... is of the greatest importance to the family court. *Standard for Juvenile and Family Courts* suggests that a family court judge be a member of the bar in the state where he is to serve and that he have some prior experience in the practice of law. Also, he should be:

1. Deeply concerned about the rights of people.
2. Keenly interested in the problems of children and families.
3. Sufficiently aware of the contribution of modern psychology, psychiatry and social work that he can give due weight to the finding of these sciences and professions.
4. Able to evaluate evidence and situations objectively, and make dispositions uninfluenced by his own personal concepts of child care.
5. Eager to learn.
6. A good administrator, able to delegate administrative responsibility. (Applicable when administrative judge.)

7. Able to conduct hearings in a kindly manner and to talk to children and adults sympathetically and on their level of understanding without loss of the essential dignity of the court.

Despite the agreed importance of the family court judge to the successful implementation of family court goals, the Standard Act makes no specific provision for the family court judge's manner of selection, qualifications or compensation. The only reference to selection of judges permits states to carry on their existing methods. Probably the draftsmen abstained from embroiling themselves in questions of judicial selection and competence out of a desire to limit the goals of the Standard Act to jurisdictional and procedural reforms." (592)

And in Canada, the Canadian Corrections Association and Canadian Welfare Council have stated:

"Qualifications

1. The judge should be a person of high personal integrity with a reputation for that integrity throughout the community.
2. The judge should be a person with court experience, and with knowledge of the law and the ability to apply it.
3. The judge should have intelligent and sympathetic understanding of children and parents.
4. The judge should have a wholehearted faith in the value and method of family court procedure.
5. The judge should be a person whose appointment meets with the approval of the community." (593)

2. Professional training and qualifications

It will be recalled that the Institute of Law Research and Reform recommended that federal appointments to the proposed Family Court should satisfy the requirements of section 3 of the Judges Act, R.S.C., 1970, ch. J-1, and accordingly no person should be eligible for such appointment

unless he or she is a barrister or advocate of at least ten years standing at the bar of any province. The Institute of Law Research and Reform further recommended that existing Family Court judges should be eligible for appointment to the proposed Family Court whether or not they are members of the bar, but that, except for such judges, provincial appointments to the proposed Family Court should be members of the bar. A further exception was included concerning part-time provincial appointments, with respect to which the Institute of Law Research and Reform recommended that no legal qualifications should be prescribed. (594)

Transposing the above recommendations into the context of the writer's previous submissions⁽⁵⁹⁵⁾ respecting the establishment of a unified Family Court as a Division of the Superior or Supreme Court of the Province, with hearings presided over by judges and, in some cases, by referees, it is submitted that the qualifications for the appointment of the judges should correspond to the requirement defined in section 3 of the Judges Act, supra. It is further submitted that referees should be appointed from the ranks of barristers, advocates or notaries of not less than five years standing at the bar of any province. (596) In order to assimilate the experience and expertise of judges currently sitting in established Juvenile and Family Courts, it is submitted that such judges should be exempt from the above requirement respecting the minimum qualifications of referees but no similar exemption should extend with respect to their possible appointment as

judges of the proposed Family division of the Superior or Supreme Court of the Province. (597) It is also submitted that the needs of outlying or rural areas should be met by full-time judges and referees under a circuit system, (598) but, if part-time appointments are deemed necessary, the legal qualifications required of full-time appointees should not be relaxed or waived. This writer accordingly rejects the conclusion of the Institute of Law Research and Reform that no legal qualifications should be prescribed for part-time appointees.

Although there appears to be substantial, but not unanimous, opinion supporting the view that judges and referees of the Family Court should be selected from the ranks of the legal profession, (599) opinions vary widely concerning the extent to which the judges and referees should also have training, experience or expertise in social welfare and the social or behavioural sciences. In defining Standards for Juvenile and Family Courts, the United States Department of Health, Education and Welfare concluded:

"THE JUDGE

...In order to be fully qualified for this work the judge should have been admitted to the bar in the State where he is to serve and have had some experience in the practice of law. ...

It is not necessary, however, for a judge to have training or experience in social welfare or social sciences. The early insistence that the judge be 'an expert in the sciences of human behavior and in the art of adjusting human relations' arose from a misconception of the judicial function at a time when child care and treatment agencies were less well developed than they are today. While the court's decisions may relate to treatment and

involve the judge's ability to understand, respect and evaluate expert opinion presented, the judge himself does not directly undertake or control treatment functions. ...

THE REFEREE

...To be qualified a referee should be:

1. A member of the bar in the State in which he is to serve as a referee, with some experience in the practice of law.
2. Familiar with the philosophy and the practice of the court." (600)

And Elizabeth and Richard Dyson have stated:

" For some time theorists have assumed that family court judges needed to be especially compassionate people, with special talents in psychology and human relations. A citizen's committee, for example, says that family court posts require 'a combination of patience, stamina and sympathy that is required to a like degree in civil court cases.' The New York Family Court Act exhorts judges of the family court to be 'familiar with areas of learning and practice that often are not supplied by the practice of law.'

Some observers, on the other hand, have questioned the necessity for special skills or training of the kind described. An attorney intimately familiar with the New York Family Court feels that some judges' prior backgrounds in the social sciences have not necessarily led to ability on the bench. If this attorney had to choose one factor predictive of a good family judge, it would be 'the quality of being a good lawyer' — which would include a dislike for arbitrary rulings and respect for litigants' rights.

Few existing family court judges do have special training or experience in the social sciences or in fields of law related to those practiced in a family court." (601)

The above opinions may be compared with those expressed in the Report of The Royal Commission Inquiry Into Civil Rights, Ontario, 1969, wherein it was stated:

" The problem of providing properly trained full-time juvenile and family court judges can only be solved by approaching it on a broad basis. There should be an end to piecemeal and improvised remedies. The solution does not lie in merely establishing a principle that all juvenile and family court judges should have legal training. A good layman is likely to make a very much better juvenile and family court judge than a poor lawyer who has obtained the appointment as an expression of gratitude for political services rendered. On the other hand, it is an unjustified encroachment on the civil rights of an individual to have his legal rights determined by a judge who is not adequately trained in the law. It is likewise an unjustified encroachment on the civil rights of an individual to have the social rights of children determined with too many legalistic trappings. A juvenile and family court judge should be specially trained for his duties.

A senior probation officer said that 'the caliber of the bench must be raised and judges should be lawyers in all cases. The best probation and rehabilitation in the world will wither if the bench is poor.' Legal training is not enough. This is an area in which the Continental system of appointing judges should be followed. There judges are trained as career judges. They are not appointed from the bar as in Canada. Experience in the actual practice of law is not likely to be of much value to a juvenile and family court judge. Nor will years of training in commercial, corporation and property law assist him.

A special training course should be established in at least one university in Ontario at which students could get training

in all those branches of the law and the social sciences required for the good administration of juvenile and family courts. Following their graduation the students should be required to serve as probation officers in these courts for at least five years. Following this service they should be eligible for appointment as juvenile and family court judges.

The province should be divided into juvenile and family court areas. A full-time judge should be appointed to serve in each area." (602)

Adding further to the divergence of opinion, more particularly in the context of the appointment and training of Juvenile Court judges, the Report of the Department of Justice on Juvenile Delinquency in Canada has stated:

"224. The questions that we now have to resolve are: (a) what qualifications should be required of juvenile court judges? (b) what methods can be devised to ensure that the person who is appointed a juvenile court judge does possess those qualifications? The answer to the first question depends largely upon the powers it is thought proper to give to the judge. If he is to be responsible for both the fact-finding and disposition functions, as he is under the present Act, presumably he will require qualifications different from those necessary for a judge who is responsible for fact-finding alone. We think that the judge should retain his present powers. The suggestion that the disposition process should be vested in an expert administrative board- presumably composed of psychiatrist, psychologists and social workers - is based, in our opinion, upon a somewhat overly simplified view of the purposes of the criminal law. Those who advance this suggestion tend to assume that the sole function of the sentencing authority is to impose a sentence that is likely to rehabilitate the offender. This is a paramount function, but certainly not an exclusive one. The purposes to be achieved in a sentence are many and often

conflicting - and this remains true, if to a lesser extent, even in a juvenile court proceeding. Not only must the court attempt to rehabilitate the offender, it must also be concerned with protecting the public against future offenders and with protecting the offender himself from excessive or inhumane detention or treatment methods. It is important to recognize also that we know little about the effect that any particular disposition of a case will have upon a particular offender. In this situation, where the liberty of the subject is at stake, it seems to us to be the better part of wisdom to leave the power of disposition with the judiciary.

225. The conclusion to be drawn, we suppose, is that ideally a judge of the juvenile court should possess the legal knowledge of a justice of the superior court and the knowledge of personality dynamics and social resources of a psychiatrist or of a social worker. Obviously such knowledge is rarely combined in one individual. For this very reason it is the practice in a number of European countries to appoint a joint bench in juvenile court cases. Usually a professional jurist presides, assisted by one or more experts or laymen who are present either in the capacity of assessor - that is, as a member of the court itself - or that of official adviser to the court. The American practice is to require a legal background in persons appointed to the juvenile court. While we think that this qualification is perhaps desirable, we doubt that it is essential. The fact-finding process in which legal training is useful is only one aspect of the court's work. It is important to bear in mind also that more than ninety percent of accused children admit the charges against them. We recognize that the court must be alert to avoid those violations of civil liberties that have occurred in the juvenile courts of Canada as well as those of the United States. Here also legal training would be helpful. However, we think that if persons of adequate intellectual powers and human experience are appointed, the amount of legal knowledge that would be required to enable them properly to perform their functions could be learned under a training program. We have already considered elsewhere the way in which the provisions of the Act relating to waiver of jurisdiction might be altered to assist the juvenile court judge in dealing with cases that involve difficult questions of law or fact.

226. The juvenile court judge must know enough law to be able to conduct a hearing in accordance with legal principles. On the other hand, to make a proper disposition of a case after an offence is proven the judge needs only a general understanding of youth, a familiarity with the resources available to the court, and sufficient knowledge of the social sciences to weigh the advice that is given to him by experts in these fields. For this reason we do not think that a professional background in Psychiatry, psychology or social work is essential for a juvenile court judge. It is those responsible for the carrying out of treatment that require special qualifications of this kind, rather than the person responsible for the decision as to the form of treatment that is to be given by those competent to give it. However, we do think that a new appointee, whether lawyer, psychologist or social worker, should ordinarily receive a specialized program of training, covering such matters as the principles of child psychology and personality development, the prevention and treatment of delinquent behaviour, juvenile court law and the rules of evidence, and the organization and administration of a juvenile court. So far as possible, such training should be given before a judge assumes his duties. In recent years, specialized courses and institutes for juvenile court judges have been developed in the United States. We recommend that steps be taken to make this kind of training available to Canadian judges. Implementation of this recommendation would, in our view, constitute a valuable first step in the direction of establishing professional qualifications for judges of the juvenile and family courts of this country." (603)

By way of alternative to multi-disciplinary training programs for Family Court judges, it has been suggested that the "bench" should be comprised not only of a lawyer but also of experts from other disciplines and laymen. Thus, the Institute of Judicial Administration at the University of Birmingham, in its comment on a Paper of the Family Courts Working Party of the Law Commission, England, has stated:

"29. With great hesitation, we suggest that the personnel of the court should consist of both judicial and 'executive' (although we do not favour this word - perhaps 'court helpers' might be suitable.)

A. The Judicial

(a) A Family Court Chairman, who should be a lawyer, with a special training in human behaviour or some background of participation in community welfare.

(b) Laymen and women, perhaps chosen as J.P.s presently are and arguably, trained in a similar way to that of counsellors in the Marriage Guidance Council.

(c) Senior Social workers or possibly senior officers of the Department of Health and Social Security.

It is suggested that each panel should consist of a lawyer chairman, two lay assessors and a social worker. The bench should at each sitting be so constituted that it contains at least one woman and at least one man. The court should have power to co-opt specialist assessors." (604)

Before expressing general conclusions respecting the qualifications and training of Family Court judges, it is appropriate for this writer to comment on the specific opinions expressed in the last two mentioned reports. In response to the opinion expressed in the Report on Juvenile Delinquency in Canada that a legal background is desirable but not essential, it is submitted that this opinion, even if tenable where the judge is confined to exercising jurisdiction in juvenile proceedings, cannot be sustained with respect to a judge presiding over a unified Family Court that exercises comprehensive jurisdiction not only in juvenile proceedings but also in all matrimonial and familial proceedings.

And with respect to the suggestion of the Institute of Judicial Administration of the University of Birmingham concerning the composition of the "bench", it is submitted that the proposed appointment of a social worker and other co-opted specialists to assist the legally trained chairman confuses the adjudicatory role of the court with the ministerial roles to be discharged by the multi-disciplinary support staff.

In light of the above diverse opinions and comments, the writer now proposes to summarize his basic conclusions respecting the qualifications and training of judges or referees to exercise jurisdiction in a unified Family Court. The writer has already expressed the firm opinion that judges and referees should be appointed from the ranks of the legal profession. This opinion does not imply that such appointees will necessarily have expertise in family law before their appointment and any training program for judges and referees should specifically include family law and procedure within its ambit.⁽⁶⁰⁵⁾ The writer further submits that prior training, experience or expertise in social welfare or in the social or behavioural sciences should not constitute a condition precedent or an alternative qualification for appointment to the bench of the Family Court. Finally, the writer submits that multi-disciplinary training programs should be developed for judges and referees of the Family Court in order to avoid legalistic dispositions of inter-spousal and familial problems and in order to promote the most constructive use of non-legal expertise in the administration of justice in matrimonial, familial and juvenile proceedings.

3. Specialization, term appointments and rotation of judges

The previous analysis will have indicated that the writer is of the opinion that the judge or referee of the Family Court should be a specialist. Accordingly, the term of office or assignment to the Family Court must be sufficiently long to enable an expertise to be acquired through experience as well as training and to permit the benefits of such expertise to be fully realized in the administration of justice in matrimonial, familial and juvenile proceedings. The writer accordingly opposes fixed terms of appointment and submits that the rotation of judges, such as occurs in the present Supreme Courts of the Canadian provinces, should be avoided.

It is appropriate, however, to refer to a representative selection of opinions on these matters. With respect to the issue of fixed term appointments, particular care must be exercised in evaluating the opinions expressed in the United States. It must be recalled, for example, that a multiplicity of courts typically exercises jurisdiction in family law matters in any single state and that judges are frequently elected to, rather than appointed for, a fixed term of office. The opinions must, therefore, be weighed in the broad context of the status to be accorded to a unified Family Court and the security of tenure to be extended to the judges and referees of such a court. The former matter has already been discussed by this writer and the latter will be discussed in the last section of this analysis.

In an early report of the United States Department of Labor, it was stated:

" The judge should be chosen because of his special qualifications for the work. The terms of office should be sufficiently long to make specialization possible, preferably not less than six years. The judge should be able to devote such time to the work of the court as is necessary to hear each case carefully and thoroughly and to give general direction to the work of the court." (606)

The above observations were made with respect to Juvenile Courts, which are courts of inferior status, in the United States, and may be compared with the observations in a subsequent report of the United States Department of Health, Education and Welfare, wherein it was stated:

" Rotation of judges where selection is by assignment has advantages in that it keeps the judge abreast of other fields of law and also exposes more judges to the field of family law. When the court is part of the highest court of general trial jurisdiction in an integrated court system with certain administrative and policy-making functions centralized in the judiciary at the State level, adverse effects from rotation are not likely to occur. However, short-time assignments, for example, less than a year, should be avoided, particularly in the first assignment. Excessively short-term assignments do not give the judge sufficient time to become experienced in this specialized field." (607)

In formulating the above opinion, reference was made by way of footnote to the following resolution adopted in 1965 by the National Council of Juvenile Court Judges:

"Rotation of Judges — the concept of diluting and quite possibly destroying the Juvenile Court philosophy by rotating its bench among judges having neither desire nor interest nor training for the specialized court, of terminating to all intents and purposes any conti-

nuing training and inter-changes among judges of juvenile courts, of delivering effective operation of the juvenile court to its staff, and of assuming that a permanent social personnel can be effectively balanced by rotating legal personnel is decried and emphatically opposed." (608)

The concept of specialist judges or referees in a unified Family Court has been generally endorsed in the several provincial studies undertaken in Canada. The notions of fixed terms of office and rotational assignments were specifically rejected in the Alberta Working Paper on Family Courts⁽⁶⁰⁹⁾ and appear inconsistent with the concept of an autonomous Family Court that was endorsed by the Civil Code Revision Office in Quebec.⁽⁶¹⁰⁾

Debating the opposing views on rotational assignments, the following statements were made in the Brief of the Pastoral Institute of the United Church of Canada to The Special Joint Committee of The Senate and House of Commons on Divorce:

" In the June 28, 1966 proceedings of this Committee, Mr. Justice A.A.M. Walsh, Senate Commissioner, in discussing transfer of Quebec and Newfoundland divorce jurisdiction from the Senate to the Exchequer Court reflected the opinion of many members of the bench and bar towards domestic proceedings:

' That system would have various advantages. One is that there would be a variety of judges who could hear these cases. It might be necessary to appoint additional judges but they would rotate on it and one person would not be left doing nothing but divorce work for his life, as it might be at present. I personally feel not only that it is not an assignment one would want to continue for life but that it is not good for any judge to hear just one type of case.

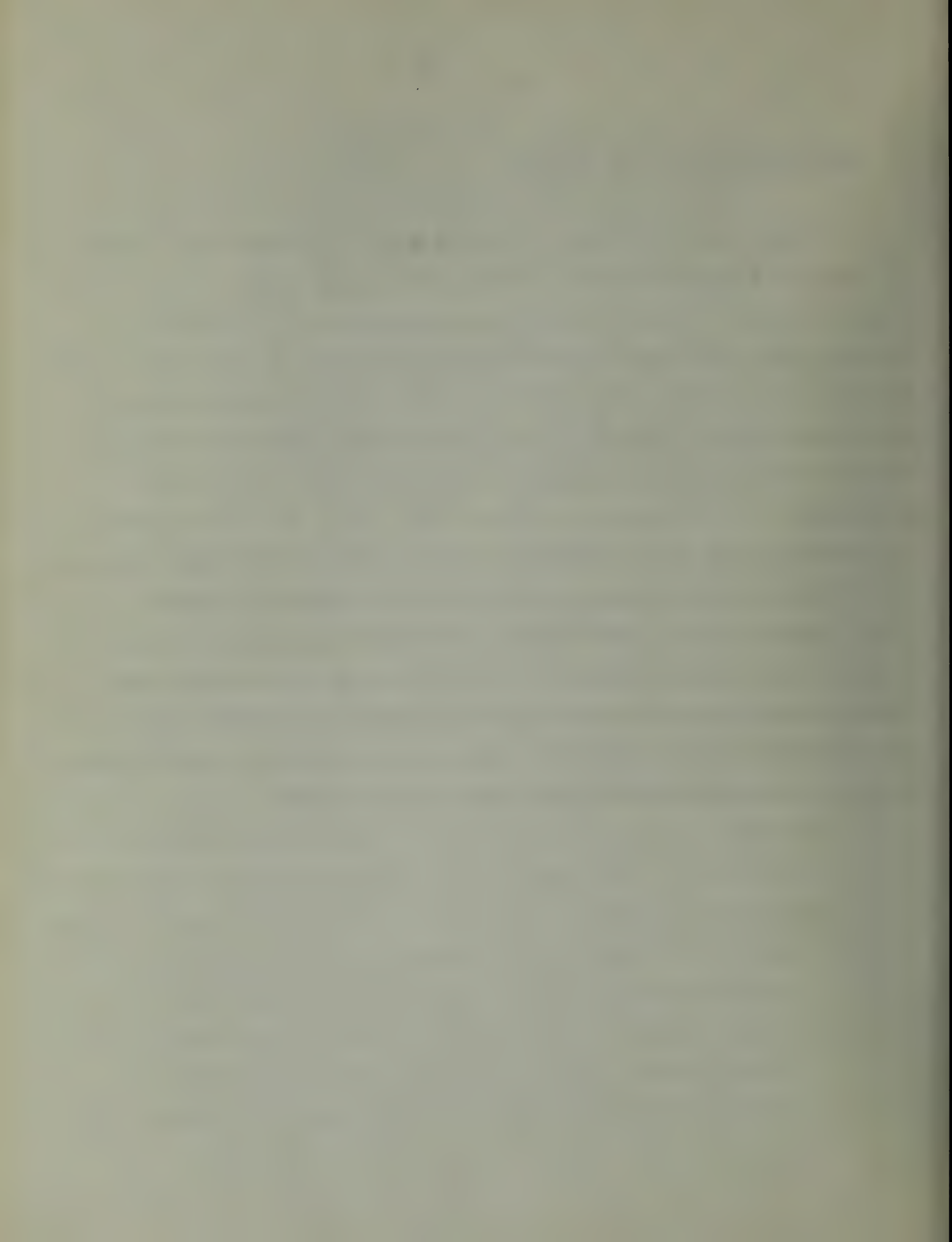
After three, four or five years, inevitably he will become somewhat stale at it and a fresh approach would be better. I think it is more desirable that there should be three, four, five or six different judges contributing to the jurisprudence on the matter and hearing the cases, than that one or two judges should do nothing else indefinitely.'

We respectfully disagree with Mr. Justice Walsh's views on specialization. To a greater extent than any other branch of the law, domestic proceedings require not only sound legal training but the insights that can be provided by the behavioural sciences. Only by adopting the specialization urged by Mr. Justice Scarman can we develop such courts as the Family Court of Toledo, Ohio, in which Judge Paul Alexander presided." (611)

This writer shares the opinion of the Pastoral Institute of the United Church of Canada and concludes that a specialist bench in a unified Family Court will exercise a wide diversity of jurisdiction and that no serious danger of staleness is likely to be encountered. This conclusion appears to be confirmed by experience in the current Juvenile and Family Courts in Canada, which exercise a far more restricted jurisdiction in matrimonial, familial and juvenile proceedings than that envisaged for the judges of a unified Family Court. Furthermore, the proposals of this writer respecting appointment of judges to the Superior or Supreme Court of the Province and subsequent assignment by the Chief Justice to the proposed Family Division⁽⁶¹²⁾ would facilitate re-assignment of the judge, if the alleged dangers of an unrestricted diet of family law cases were to materialize or a judge were desirous of exercising a non-familial jurisdiction in another Division of the Superior or Supreme Court of the Province.⁽⁶¹³⁾

4. Salary and security of tenure

It is impossible to divorce the questions of the salary and tenure of judges or referees from the central issue of the status of the Family Court and its place in the judicial structure. In view of the wide range of alternative dispositions available in this context,⁽⁶¹⁴⁾ the writer will confine his observations that the Family Court should be established as a Division of the Superior Court or Supreme Court of the Province. In such a context, it is submitted that relevant provisions of the British North America Act, 1867, and of the Judges Act, R.S.C., 1970, ch. J-1 would and should apply to the Judges assigned to the proposed Family Division of the Superior Court or Supreme Court of the Province. Appropriate formulae must be devised, however, to regulate the salary and tenure of referees. It is submitted that referees appointed to the Family Division should be accorded rights with respect to salary and tenure that are at least equivalent to those presently extended to provincial judges or magistrates.



FOOTNOTES

1. Relevant statistical and empirical data is being sought by Professor Murray Fraser who is examining the development in Canada of specialized courts dealing with juvenile and family problems, and the philosophy, structure and operation of the existing courts which exercise jurisdiction in matrimonial and familial proceedings.
2. Frederick Elkin, The Family In Canada, Canadian Conference on The Family, Ottawa 1964, at p. 8.
3. Mr. Justice Scarman, "Family Law and Law Reform", Public Lecture, University of Bristol, March 18, 1966, at p. 2.

See also opinion of Traynor, J. in DeBurgh v. DeBurgh, 39 Cal. 2d 858, 863-864, 250 P.2d 598, 601 (1952):

"In a divorce proceeding, the court must consider not merely the rights and wrongs of the parties as in contract litigation, but the public interest in the institution of marriage. The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve the marriage. But when a marriage has failed, and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted.

Public policy does not discourage divorce where the relations between husband and wife are such that the legitimate object of matrimony has been utterly destroyed."

Compare Professors Fowler V. Harper and Jerome H. Skolmick, Problems of the Family, Revised Edition (Bobbs Merrill, Indianapolis), 1962, at pp. 1 and 3:

" In a pluralistic society such as ours, which contains a variety of religious and ethnic groups, there may actually be far less consensus on the goals of family law than is commonly held to be the case. Furthermore, disagreements occur not only according to ethnic and religious distinctions, but by political persuasions as well. Responsibilities which once were accorded to the individual, or more

precisely, to the individual family unit, are now being carried out by local, state or federal authorities. As a result, family relations are often increasingly controversial. Consider only some of the areas which family law, in a broad sense, attempts to regulate. Within the family it imposes a variety of judgments regarding (a) the degree to which a member may exercise authority over other members; (b) economic rights and duties of the member; (c) the morality of behavior by one member toward another; (d) the legal status of members; (e) the affectional and sexual activities of the members and the limit of deviation; (f) parental duties with respect to physical and mental health, safety and education of children.

Family law probably illustrates better than any other body of legal materials the jurisprudential dilemma in a society containing a variety of sub-cultures. The dilemma arises out of the attempt to apply universal rules of conduct to particular, and often different, sub-cultures. Perhaps in no other field of law, not even international law, are general rules burdened with the opposition of strongly held norms and values. This is because every family, although not a 'little society' since its members must carry on activities outside, is nevertheless a 'differentiated subsystem' which develops its own patterns of behavior and uses (some of which may be shared by other families, with varying frequency and conviction."

4. House of Commons Debates, Vol. 112, Number 94, 2nd Session, 27th Parliament, Tuesday, December 5, 1967, at p. 5015.
5. Stephen C. O'Connell, Justice, Supreme Court of Florida, "Divorce—A Public or Private Affair" (1965) Proceedings of Section of Family Law (American Bar Association) 38, at pp. 40-41.
6. Mr. Justice Scarman, loc. cit, supra footnote 3, at p. 3. See text infra, sub-heading "Enforcement".

7. Mary K. Sitton and Thomas M. Martinez, "A Case for Family Administrative Law", Ch. 29, Nester C. Kohut, Therapeutic Family Law, Adams Press, Chicago, 1968, pp. 362-369.
8. Report of Committee on Children and Young Persons, Secretary of State for Scotland, Cmnd. 2306 (1964). Compare the Report of the Committee on Children and Young Persons, England, Cmnd. 1191 (1960) (Ingleby Report), at pp. 26-30, wherein the use of quasi-judicial or administrative procedures is rejected. For a valuable comparative analysis of judicial and administrative procedures, see Ola Nyquist, Juvenile Justice, (A Comparative Study with Special Reference to the Swedish Child Welfare Board and the California Juvenile Court System), Cambridge Studies in Criminology, Volume XII, (1960). See also Report of Department of Justice Committee on Juvenile Delinquency, Canada, 1965, wherein recommendations for reform of the law relating to juvenile delinquency are predicated upon retention of the judicial process.
9. Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205.
10. Ibid., at pp. 1207-1208. See also Roscoe Pound, Dean Emeritus of Harvard University, "The Place of the Family Court in the Judicial System" (1959) 5 N.P.P.A.J. 161, at pp. 166-167:

"There are great advantages in a family court with general, including juvenile court, jurisdiction rather than a wholly administrative agency such as a board of children's guardians which was at one time advocated instead of the juvenile court. Although there was for a time in the early part of this century a cult for the administrative in this country, experience has been making us appreciate the importance of the ethos of judicial administration —of open hearings of both sides with full disclosure of the case to be met on each side, of acting upon evidence of logically probative force, of care not to combine the positions of accuser, prosecutor, advocate of the complainant and judge, and of a record from which it can be seen what has been done and why, and of possibility of review before an independent bench of judges in order to secure constitutional and legal rights. ... A well-regulated family court, part of a unified judicial system, is better adapted than a purely administrative agency to keep the balance between justice and security. More-

over, not merely in the setting up of an effectively organized family court but increasingly on every side of organized administration of justice there is today a task of development of the apparatus of sheriff's officers, clerks, shorthand reporters, and bailiffs, familiar from our formative era, into the full and well-trained administrative, investigatory, and advisory staff required for the complete and effective administration of justice in the society of today."

11. 387 U.S. 1 (1967)

12. See Monrad G. Paulsen, "The Juvenile Court and the Whole of the Law" (1965) 11 Wayne Law Rev. 597, at p. 609:

"Courts of law may not abandon procedural fairness because the aim of a proceeding is apparently good. Professor Francis Allen of the University of Chicago, has reminded us that force is not transformed into welcome benevolence by words.

'It is important, first, to recognize that when, in an authoritative setting, we attempt to do something for a child "because of what he is and needs," we are also doing something to him. The semantics of "socialized justice" are a trap for the unwary. Whatever one's motivations, however elevated one's objectives, if the measures taken result in the compulsory loss of the child's liberty, the involuntary separation of a child from his family, or even the supervision of a child's activities by a probation worker, the impact on the affected individuals is essentially a punitive one. Good intentions and a flexible vocabulary do not alter this reality.'*

One final word about procedural fairness. The observance of due process standards may well promote the acceptability of the court's processes. Justice is good for children as well as adults. Some formality and proper attention to the important procedural values need not interfere with the desired rehabilitative aim of the court. After all, a court appearance is like a fatherly interview only in our fantasies."

* Allen, "Borderland of the Criminal Law: Problems of Socializing Criminal Justice" (1958) 32 Soc. Ser. Rev. 116.

13. Report of the Governor's Commission on the Family, California, 1966, at p. 10. The Commission specifically addressed its attention to the Sitton-Winterfeld proposals in articulating its conclusions. See Richard C. Dinkelspiel and Aidan R. Gough, "The Case for a Family Court - A Summary of the Report of the California Governor's Commission on the Family (1967) 1 Family Law Qtrly. 70, at p. 73:

"There has been widely circulated in recent months in California an initiative proposal to remove family matters from the courts entirely and to place them in the hands of an administrative body to which a spouse could personally resort. The Commission is convinced that this is wholly unworkable, and that to treat family matters as subjects for administrative determination by an independent 'agency' would be to debilitate the administration of justice and diminish the efficacy of the process by inviting successive appeals to the courts. The enforcement of orders would be rendered more complicated and less effective, and a process already ill-suited to the cases it must handle would be made more complex and costly."

14. Standards for Juvenile and Family Courts, U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437, 1966, pp. 10-12.
15. Lindsay G. Arthur, "A Family Court -- Why Not?" (1966) 51 Minnesota L. Rev. 223, at p. 228.
16. Paul W. Alexander, "Family Cases Are Different -- Why Not Family Courts?" (1954) 3 Kansas Law Rev. 26, at pp. 28-29.
17. See Law Commission, Family Courts Working Party, reprinted in Appendix A.
18. University of Birmingham, Institute of Judicial Administration, Family Courts: Comments on a Paper prepared by the Family Courts Working Party of the Law Commission, April, 1972, p. 9, paras. 23 and 24.

The need for more effective liaison between the family courts and social welfare agencies and government departments is also evident in Canadian jurisdictions. See, for example, Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, at pp. 13-15:

"None of the Courts [in Ontario] are presently involved directly with the administration of public welfare monies. It is included here because it is an essential service to the family. The administration of welfare is fragmented among scores of municipalities and the Provincial Government. Uniformity of interpretation and administration is lacking with occasional seriocomic results. The present system lacks co-ordination with the Court, essential for maximum social impact and due financial recovery from defaulting husbands. There is a lack of uniformity and duplication in the method of enforcing maintenance of payments. The husband is ordered to pay maintenance for his wife and children to the Family Court which maintain records. Municipal Welfare also maintains records of benefits paid to the wife. Some municipalities take an assignment from the wife of monies remitted to Court by the husband. The municipality receives such monies from the Court and maintains a record thereof as well. Subsequently the case is transferred to Family Benefits under Social and Family Services, which invariably takes an assignment, and a further set of accounts is maintained. There is no system devised for supervision of accounts and enforcement against delinquent defendants. In 1969, over eight million dollars were collected under maintenance orders. It is estimated that this probably represents about one-third of monies actually ordered to be paid. There is little doubt that the Government loses millions of dollars annually in the failure of husbands to reimburse for welfare monies expended. There is an obvious need to simplify and systematize present procedures."

19. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972.
20. Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969.
21. Family Law Project, Ontario Law Reform Commission, Volume X, Family Court and Social Services, 1969.
22. Professor H.W. Silverman, Q.C., "A Plea for Reform of Matrimonial Law" (1972) 20 Chitty's L.J. 146, at p. 148.
23. Roscoe Pound, Dean Emeritus of Harvard University, "The Place of the Family Court in the Judicial System" (1959) 5 N.P.P.A.J. 161, 164, 167, 168.
24. Ibid., at p. 162.

See also Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J1. Family Law 505, at p. 516:

"[Fragmentation of jurisdiction] is wasteful of time, money and resources. Valuable time may be spent researching questions of jurisdiction, and successive appeals may have to be taken on procedural points. The problem of equal justice before law may be aggravated by the existence of different forums for resolution of essentially similar issues. Precedents set by one court need not be followed by others, and each court may differ in procedure and policy in handling a case. Such social work staff as the courts employ may duplicate efforts, or worse undo each other's work. In the absence of any central file or previous litigation of a given family, contradictory and sometimes tragic dispositions may take place."

25. Andrew S. Watson, M.D., "Family Law and Its Challenge for Psychiatry" (1962) 2 J1. Family Law 74, at p. 76.
26. See, e.g. Institute of Law Research and Reform, Province of Alberta Working Paper, Family Court, April, 1972, at pp. 24-25; Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at pp. 6-7; Professor Herma Hill Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at p. 1241; Professors Richard C. Dinkelspiel and Aidan R. Gough, "A Case for a Family Court—a Summary of the Report of the California Governor's Commission on the Family" (1967) 1 Family L. Qtr1. 70, at p.72; Lindsay G. Arthur, "A Family Court—Why Not?" (1966) 51 Minnesota L. Rev. 223, 224, and 229; James C. MacDonald, "A Comprehensive Family Court" (1967) 10 Can Bar J1. 323, at pp.325-327;

Standards for Juvenile and Family Courts, U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437, 1966, at pp. 27-28. The Child, The Family and The Court, U.S. Department of Labour, Children's Bureau Publication 193, 1929, at pp. 3-4, citing Roscoe Pound, "The Administration of Justice in the Modern City" (1913) 26 Harvard L. Rev. 302 at p. 313.

See also Paul W. Alexander, "The Family Court—An Obstacle Race?" (1958) 19 Univ. Pitt. L. Rev. 602, 603; Professor W. Gellhorn, Children and Families in the Courts of New York City, Dodd Mead and Company New York, 1954, M. Virtue, Survey of Metropolitan Courts — Detroit Area (1950).

27. William J. Moshofsky; Chairman, Oregon Council on Crime and Delinquency, "A Proposal to improve Court Services to Families and Children in Oregon" (1966) 46 Oregon L. Rev. 77, at p. 78.
28. Ibid., at pp. 78-79.
29. University of Birmingham, Institute of Judicial Administration, Family Courts: Comments on a Paper prepared by the Family Courts Working Party of the Law Commission, April, 1972, pp. 1-3, paras. 5-10. See also ibid., v. 5 para 14, wherein it is concluded that there is a "need for something approximating to the family courts which have been established in some parts of the world, notably in several jurisdictions of the U.S.A., and in Japan."
30. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, at pp.23-26. See also text to and contents of footnote 40, infra.
31. Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at pp. 5-7.
32. A limited jurisdiction to award the custody of children to the mother vests in the Provincial Court (Family Division) pursuant to section 2(4) of the Deserted Wives' and Children's Act, R.S.O., 1960, ch.105. There is, however, no corresponding jurisdiction to award the custody of children to the father, who must accordingly have recourse to the Surrogate Court or to the Supreme Court: Peti v. Reti (1972) 4 R.F.L. 50 (Ont. Prov. Ct., Fam. Div.).

It would appear, however, that no jurisdiction can vest in the Surrogate Court if jurisdiction over custody has been established in the Provincial Court (Family Division) by prior proceedings and prior order: see Reti v. Reti, supra; compare Regina v. Anagnostis [1970] 1 O.R. 595, [1970] 1 C.C.C. 234 (Ont. Co. Ct.)

33. See also James C. MacDonald, "A Comprehensive Family Court" (1967) 10 Can. B.J. 323, at p. 325:

" Such extensive multiplicity may not occur with frequency either in American or Ontario practice, but in each case the possibilities are there, available to anyone minded to harass the opposing party into submission. In practice, without there being malicious motives, it is not too unusual to find ourselves confronted with support proceedings in Family Court, partition of property in County Court, and a divorce action in Supreme Court—all with respect to the same parties and family. We also face the possibility, sometimes realized, of litigating the same cause of action in at least two of three different courts. A custody claim by a wife might be tried in Family Court, retried in Surrogate Court and retried again in Supreme Court; this time, along with divorce proceedings."

And at pp. 328-329:

"All of us would probably agree with these conclusions — that the family is a unit which should be dealt with as a whole and not piecemeal; that to achieve this, there must be a Court with authority to deal with every legal problem which arises in the family; and, that to prevent the parties themselves from dividing the matter among the several Courts, access to the other Courts must be restrained—probably by taking away any jurisdiction these other Courts possess over family matters."

34. Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, at pp. 4 and 5.

35. "Recommendations for Grouping of Jurisdiction

1. Forthwith, that jurisdiction in custody and adoption be transferred to the Provincial Court (Family Division).

2. That negotiations be entered into with the Federal authorities for granting to the Provincial Court (Family Division) jurisdiction over divorce.

3. That jurisdiction over property rights be transferred to the Family Court concurrent with jurisdiction of divorce.

4. That a study be made with the objective of instituting a form of compulsory conference between a court officer and the marriage partners to assist in defining issues and in negotiating amicable agreement upon some or all of those issues." : Ibid, at p. 5

36. Report of The Royal Commission on The Status of Women in Canada, September 28, 1970 (Ottawa), at p. 252.

See also Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, No. 8, Tuesday, November 22, 1966, at pp. 423-425, wherein the United Church of Canada recommended that exclusive jurisdiction over matrimonial and familial proceedings should be vested in a single court composed of two divisions, a High Court Division presided over by federal appointees and exercising a comprehensive jurisdiction, and a Family Court Division presided over by provincial appointees with restricted jurisdiction reflecting constitutional limitations.

37. Such fragmentation promotes costly litigation concerning the boundaries of jurisdiction vested in the respective courts and the inter-relationship between competing jurisdictions, proceedings, and orders. Cases which have been reported in recent years inadequately illustrate the dimensions of the problem but nevertheless signify the validity of the above conclusion. See e.g., Reti v. Reti (1972) 4 R.F.L. 50 (Ont. Prov. Ct., Fam. Div.); Re Catholic Children's Aid Society of Metro. Toronto [1972] 2 O.R. 598; Re Smith and Gowland [1969] 1 O.R. 769, (1969) 4 D.L.R. (3d) 115 (Ont. Dist. Ct.); Turner v. Turner (1967) 59 D.L.R. (3d) 277 (B.C.S.C.); Bray v. Bray [1971] 1 O.R. 232, (1971) 15 D.L.R. (3d) 40; O'Neill v. O'Neill (1971) 19 D.L.R. (3d) 731, (1972) 5 R.F.L. 98 (N.S.S.C.); Emerson v. Emerson [1972] 3 O.R. 5, (1972) 27 D.L.R. (3d) 278; Sobering and Sobering v. Sergeant (1970) 75 W.W.R. 420, sub nom. Re Sobering and Sergeant (1971) 15 D.L.R. (3d) 112 (Man. C.A.); Goldstein v. Brownstone and Brownstone (1970) 75 W.W.R. 193, sub nom. Re Goldstein and Brownstone (1971) 15 D.L.R. (3d) 102 (Man. C.A.); Armich v. Armich [1971] 16 D.L.R. (3d) 326 (B.C.C.A.). The difficulties are compounded by reason of conflicts of judicial decisions on certain matters. For example, the decision in Armich v. Armich, supra, rejected the conclusions adopted in a previously well-established line of cases concerning the effect of a divorce decree upon a prior maintenance order granted by the Family Court pursuant to provincial legislation: see Hitsman v. Hitsman [1970] 2 O.R. 573'; Re Summary Convictions Act, 1955; Re Wives' and Children's Maintenance Act; Waterman v. Waterman (1960) 32 W.W.R. 650, (1961) 25 D.L.R. (2d) 502 (B.C. Co. Ct.); Auld v. Auld [1960] O.W.N. 62; Hoggan v. Hoggan and Mates [1957] O.W.N. 425; Roswell v. Roswell and Schmuir [1950] O.R. 748, [1970] 4 D.L.R. 801.

38. It is a well-recognized feature of divorce practice in Canada for experienced counsel to take account of the variance of judicial attitudes in the Supreme Court and to seek trial of the issues before a judge who is likely to be sympathetic to the petition. This practice is confirmed in materials on Family Law prepared for the Bar Admission Course in the Province of Alberta, wherein the "golden rule" asserted is "Know thy judge". A similar practice has been documented in the State of Indiana which probably reflects the general position in the United States:
- "The tempers and the points of view of our nisi prius judges are as varied as the leaves of a tree. No two have exactly the same point of view of a contested, or an uncontested, case in any one of the three causes of divorce discussed in this article. Often a judge of easy-going mentality will grant a divorce on one of these subjects when another of more rigid views of divorce will refuse it; and each one honestly endeavouring to reach a just result. ... This variance of views of judges is a subject of study in Marion County where any one of six of its judges can grant divorces; and it is quite common for one judge to have many more divorce cases pending before him than before any of the others and yet each judge may be equally informed upon the law of divorce and equally honest in granting or refusing divorces. Changes of venue are often taken on the ground of bias or prejudice of the trial judge in order to get the case before an 'easy going' judge; either one of the regular judges or a special one. And this is true frequently throughout the state where a change of venue is taken in order to secure a special judge who will view with more leniency the plaintiff's cause of divorce or defense than the regular judge.": W.W. Thornton, "Divorce Under the Indiana Law for Abandonment, Cruelty or Failure to Provide" (1927) 2 Ind. L.J. 519.
39. See Monrad G. Paulsen, "Juvenile Courts, Family Courts, and the Poor Man" (1966) 54 Calif. L. Rev. 694, at p. 707, who observes that the statutory consolidation of jurisdiction effected by the New York Family Court Act was substantially frustrated by a geographic fragmentation of jurisdiction which was attributable to "the pressures of specialization and the realities of inadequate facilities". Thus, juvenile, support, criminal, and adoption proceedings were allocated to separate sections of the unified Family Court which were situated in different parts of New York City, with the consequence that a family problem frequently required "a good bit of travel from one part of a single court to another".
40. Institute of Law Research and Reform, Province of Alberta, Report on Joinder of Divorce Proceedings and Other Causes of Action, August, 1971, at pp. 12-13.

41. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972 at pp. 20-21.
42. See Family Law Study, Newfoundland, Project V, Family Courts Final Report, May, 1969, at pp. 2-5.
43. See Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, at pp. 4-5, cited in text infra, sub-heading "Fragmentation of jurisdiction".

See also Ontario Law Reform Commission, Family Law Project, Volume X, Family Court and Social Services, 1969.

44. See Presidential Address to 54th Convention of Canadian Bar Association: John L. Farris, "The Value of Discontent" (1972) 3 Can. Bar J. 1:

" First, I wish to repeat what I have said on other occasions, that the adversary system of resolving disputes needs re-examination. The concept that a Judge should settle disputes only on the basis of such evidence as the contestants choose to present without regard to the rights of third parties not directly or immediately involved, is, I suggest, of doubtful validity.

The weakness of this method has been recognized when applied to matrimonial disputes. Surely the rights of children cannot be adequately secured in a bitter fight between warring parents."

See also Hon. Otto Lang, "Lawyers in an Open Society" (1972) 3 Can. Bar J. 26, at p. 27:

"... I want to repeat the view of the Prime Minister expressed at the National Conference on the Law last February that the adversary system need not be regarded as the ideal means to resolve every dispute. While we should recognize its merit in assuring that the relevant issues are examined carefully by an impartial adjudicator -- when opposing and independent counsel do their job well -- we should weigh its costs in full, costs to client and to the public, against the benefits and with alternatives firmly in mind. Particularly when the adversary system of controlled combat may increase hostilities in situations where compromise and conciliation are desirable, we should look for alternatives not only because the credibility of law and lawyer require it. The onlooker knows -- more than we give him credit -- when our system or practices are too slow or are perverse.

I think particularly of family law and of labour law as fields where more and simpler alternatives to the traditional adversary processes should be sought."

45. See also Professor Adrian Bradbrook, "An Empirical Study of the Attitudes of the Judges of the Supreme Court of Ontario regarding the Workings of the Present Child Custody Adjudication Laws" (1971) 49 Can. Bar. Rev. 557.
46. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J1 Family Law 505, at pp. 509-510.
47. Professor John B. Bradway, "Divorce Litigation and the Welfare of the Family" (1956) 9 Vanderbilt L. Rev. 665, at pp. 669-671.
48. Professor W. Gellhorn, Children and Families in the Courts of New York City (Report of Special Commission of Association of Bar of New York City), cited by William B. Lawless, Justice, New York State Supreme Court, "Compulsory Conciliation for New York?" (1965) 14 Buffalo Law Rev. 457.

See also Note, "The Standard Family Court Act Appraised" (1959-60) 35 Indiana L.J. 462, at p. 465:

" The adversary method of determining whether a divorce should be granted is as antiquated as trial by ordeal. The purpose of the family court is to provide a friendly atmosphere with competent counseling in the hope of a permanent reconciliation if that is possible. Many divorce seekers begin with the goal of riddance; not reconciliation, and if they know that in order to achieve their goal they must litigate in much the same manner as a criminal or tort case is litigated, they will react unfavorably to counseling and the purpose of the family court will be thwarted at the outset."

49. Paul W. Alexander, "The Family Court - An Obstacle Race?" (1958) 19 Univ. Pitt. L. Rev. 602, at pp. 615 and 616.
50. Keynote address of Justice Louis H. Burke to Third Annual Conference of Conciliation Courts, 1965, cited by William E. MacFaden and Meyer Elkin, "The Case of a Family Court: Progress or Chaos", Conciliation Courts Review, Vol. 6, Pt. 2, (December, 1968), at p. 8.
51. Meyer Elkin, Supervising Conciliation Counselor, Conciliation Court of the Superior Court of Los Angeles County, California, "Short-Contact Counseling in a Conciliation Court", Social Casework, April, 1962.
52. See Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at p. 1215.
53. Irving Philips, M.D., Assistant Clinical Professor of Psychiatry,

University of California, "Mental Hygiene, Divorce and the Law" (1963) 3 J. Family L. 63, at p. 64.

54. Andrew Watson, "Psychoanalysis and Divorce", The Marriage Relationship, 321, 332 (S. Rosebaum and I. Alger, eds., 1968).
 55. Andrew Watson, Psychiatry for Lawyers, 1968, at p. 275, cited by Professor Brigitte M. Bodenheimer, "New Approaches of Psychiatry: Implications for Divorce Reform" (1970) Utah L. Rev. 191, at p. 212.
 56. John M. Biggs, "Stability of Marriage - A Family Court?" (1961) 34 Aust. L. J. 343, at p. 349.
 57. Sir Frederick Pollock, Letter to Daily Telegraph, November 14th, 1936.
 58. Fred Reagh, "A Need for a Comprehensive Family Court System" (1970) 5 U.B.C. Law Rev. 13, at pp. 36-37.
- See also James C. MacDonald, "A Comprehensive Family Court" (1967) 10 Can. Bar J. 323.
59. Brief of Daryl E. McLean, Dalhousie University, Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, No. 24, Thursday, April 20, 1967, at pp. 1528-1529.
 60. Brief of P.J.T. O'Hearn, Judge of the County Court, Halifax, N.S., Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, Tuesday, February 7, at p. 664.
 61. Ibid., at p. 652.
 62. Pursuant to provincial legislation, this recommendation has been implemented in several jurisdictions, including British Columbia, Ontario, and Nova Scotia.
 63. Submission of the Honourable James C. McRuer, L.L.D., former Chief Justice of the Province of Ontario, Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, Tuesday, January 31, 1967, at pp. 596-599.
 64. Lindsay, G. Arthur, Administrative Judge of the Juvenile and Domestic Relations Division of the Fourth Judicial District Court of Minnesota, "A Family Court — Why Not?" (1966) 51 Minn. L. Rev. 223, at pp. 228-229.
 65. Presiding Judge of The Family Court Departments, Superior Court, Los Angeles County, California.
 66. Supervising Conciliation Counsellor of The Conciliation Court of The Superior Court, Los Angeles County, California.

67. William E. MacFaden and Meyer Elkin, "The Case for a Family Court: Progress or Chaos", Conciliation Courts Review, Volume 6, No. 2, December, 1968, at p. 5.
68. See text to and contents of footnote 63, supra. For a guideline as to appropriate legal fees in a simple uncontested divorce proceeding, see Re Solicitor [1971] 1 O.R. 90, wherein it was held that a proper solicitor-and-client fee for an uncomplicated divorce is \$500.
69. Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at pp. 1218-1220.
70. Alice O'Leary Ralls, Supervisor of the King County Family Court, State of Washington, "The King County Family Court" (1953) 28 Washington Law Rev. 22, at p. 26.
71. Paul W. Alexander, "The Family Court - An Obstacle Race?" (1958) 19 Univ. Pitt. L. Rev. 602, at p. 614. See also John Biggs, "Stability of Marriage - A Family Court?" (1961) 34 Aust. L. Rev. 343, at p. 347.

"The only way in which, under the present law, the full facts of an uncontested case might conceivably be brought out is by an inquisitorial system. This has some merit in it, particularly when consideration must be given to alimony and custody of children but it is a process which cannot be carried over into the courtroom when one considers the pressure of time. In the District of Columbia, uncontested divorce cases (over 80 per cent were, in fact, uncontested) once took less time to hear than parking violations. If this was to be replaced by a lengthy inquisition in court, it would be impossible to keep up with the lists. It must, instead, be admitted that no method of conventional court proceeding is apposite to an undefended divorce petition. Whilst it may be competent in a contested case, a court is completely unable to prevent collusive practices by those persons who seek to avoid the stipulated policy of the State; this condition of affairs can only lead to the law being brought into general disrepute."
72. See text to and contents of footnote 63.
73. MacDonald and Ferrier, Canadian Divorce Law and Practice, at pp. 61-1 to 61-7.
74. The Honourable Mr. Justice Scarman, "Family Law and Law Reform", Public Lecture in University of Bristol, March 18, 1966, at pp. 6-9.

75. Professor Gorecki, "Recrimination in Eastern Europe; An Empirical Study of Polish Divorce Law " (1966) 14 Am. J. Comp. L. 603. See also Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at pp. 1231-1232.
76. Fred Reagh, "The Need for a Comprehensive Family Court System" (1970) 5 U.B.C. Law Rev. 13, at p. 35. For detailed analysis of the inadequacies of the present law respecting settlements, see J.D. Payne, "Proposals for Reform of the Law Relating to Separation and Maintenance Agreements" (1968) 33 Sask. L. Rev. 1.
77. See Report of The Special Joint Committee of The Senate and House of Commons on Divorce, 1967, at p. 149:

"It is the practice in those provinces where dissolutions of marriage are granted for jurisdiction to be exercised by the Superior Courts. This practice has obvious disadvantages. The procedure of the Superior Courts is costly and involved and these courts, burdened with cases of a more weighty character, tend to dispose of their long lists of divorce cases as quickly as possible and in a perfunctory manner. The Superior Courts lack the assistance of social workers and counsellors such as Family and Juvenile Courts possess. Most people are unfamiliar with their procedure and atmosphere, which, while dignified, is not conducive to the therapeutic or conciliatory approach to marital problems. Even more important, the judges of the Superior Courts are often remote from the parties to the action and their circumstances, especially where the divorce actions are heard at Assizes by a visiting judge."

78. Cmd. 9678, 1956, paras. 749-750.

Similar sentiments are partially reflected in the following observations of Mr. Trudeau, who introduced the Divorce Bill in the House of Commons of Canada:

"[When] we are dealing with divorce we are dealing with certain fundamental rights possessed by citizens of this country. We are dealing with something much more fundamental than property rights or money matters. When we are dealing with the latter, we do have courts at different levels which deal with various questions affecting property rights according to their importance.

I feel however that when we are dealing with marriage and divorce we should go to the superior courts, which in our society are traditionally called upon to decide upon the basic rights of human beings whether in civil or in criminal matters.

I realize that one of the reasons the joint committee wanted the county courts to exercise jurisdiction in this matter was because it wanted to make sure that the court would not be too removed from the people. My only comment on this is that the superior courts, or the supreme courts as they are called in some provinces, are not removed from the people. They all have district or circuit courts which go to the people, and on balance I felt it better to continue to use the higher courts, especially at the outset when we are breaking new ground and asking our judicial system to determine the operation of important laws, and to create a whole jurisprudence, a whole system of case law, which will govern these matters for many years to come." House of Commons Debates, Vol. 112, No. 94, Monday, Dec. 5, 1967 at p. 5086.

79. See text supra. See also O.R. McGregor, Divorce in England, 1957, at p. 170:

"Neither the Denning Committee nor those who accept its restatement of the Gorell Commission's view have explained the nature of the unconscious process by which legal actions in the High Court influence the attitude to marriage of 'the people'. A casual visitor to the divorce court in London might feel that there had been an element of exaggeration in the Committee's description of its sittings as 'dignified proceedings'."

80. Limited facilities for promoting the welfare of children in divorce proceedings are presently available in the High Court of England, which has welfare officers assigned to it for the express purpose of assisting the court.

81. For corresponding conclusions in the United States, see Lindsay G. Arthur, Administrative Judge of the Juvenile and Domestic Relations Division of the Fourth Judicial District Court of Minnesota, "A Family Court — Why Not?" (1966) 51 Minn. L. Rev. 223, at pp. 224-225:

"The majority of such judges are engaged in litigation arising from automobiles and business, but are rotated into the unfamiliar divisions where family problems arise. Each judge, with his temporary competence, give his best and brief efforts to the narrow area before him. However, the areas often overlap and the judges have neither central records nor adequate staffs. As a result, the judges are frequently inconsistent and seldom aware of what their colleagues are contemporaneously doing with the same family. ...

Thus is conceived the idea of a 'Family Court': a consolidation of all of the areas of family litigation into one court where there can be unity and consistency; where a judge who is interested in the assignment can develop his skill and his empathy; where a staff can be trained in co-ordination of all aspects of family social work; and where, above all, jurisdictional strait jackets can be removed and each hearing can take account of all problems and administer all remedies."

See also Andrew S. Watson, MD., "Family Law and Its Challenge for Psychiatry" (1962) 2 J1 Family L. 71, at p. 75:

"Judges who sit in these cases will usually have little except their judicial experience to draw upon, and their legal education will be devoid of any behavioural or other science. They will view family law matters as being drudgery which will add little to their judicial stature. In most jurisdictions, judges rotate through this assignment and each looks forward to completing this unpleasant duty as quickly as possible."

82. See Submission of Daryl E. McLean, Dalhousie University, Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, No.24, Thursday, April 20, 1967, at p. 1530, citing Ralph P. Bridgman, "Counselling Matrimonial Clients in Family Court" (1959) 5 N.P.P.A.J. 187; Paul W. Alexander, "The Lawyer in the Family Court" (1959) 5 N.P.P.A.J. 172; Nester C. Kohut, "The Lawyer in Domestic Relations" (1959) 31 Man. Bar News 7; J.D. Cook and L.M. Cook, "The Lawyer and the Social Worker -- Compatible Conflict" (1962-63) 12 Buffalo L. Rev. 410; F. Harper and M. Harper, "Lawyers and Marriage Counselling" (1961) 1 J1. Family Law 73. See also Professor Brigitte M. Bodenheimer, "New Approaches of Psychiatry: Implications for Divorce Reform" (1970) Utah L. Rev. 191, cited infra, footnote 84.

For an analysis of the reasons for the lawyers' traditional scepticism respecting the value of the behavioural sciences, see Samuel M. Fahr and Ralph H. Oiemann, "The Use of Social and Behavioural Science Knowledge in Law" (1962) 48 Iowa L. Rev. 56.

83. See Professor Brigitte M. Bodenheimer, "New Approaches of Psychiatry: Implications for Divorce Reform" (1970) Utah L. Rev. 191, at pp. 205-206, citing Whittaker and Miller, "A Re-evaluation of 'Psychiatric Help' when Divorce Impends" (1969) 126 Am. J. Psychiat. 611, at pp. 614-616:

"Where the marital tie is weak and divorce threatens, intervention with one of the pair seems routinely to be disruptive. ...Accepting in therapy one member of a troubled couple should be viewed by the therapist as very possibly a step towards preventing a reconciliation. ...Divorce inevitably has many ramifications for children and families of origin. These others, significant others, should be considered for inclusion in the psychotherapy. Our own experience suggests that involving the children and parents of a couple in the midst of marital discord is often a powerfully helpful device."

84. Compare Professor Brigitte M. Bodenheimer, "New Approaches of Psychiatry: Implications for Divorce Reform" (1970) Utah L. Rev. 191 at pp. 213-214:

"Many lawyers, especially some older ones, ... continue to assume that once a person knocks at their door to obtain a divorce it is too late for a reconciliation. On the other hand, a growing number of lawyers recognize the serious problem of unnecessary divorce but find it difficult to adjust to the new situation. The lawyer's problem has many facets: (1) he is representing one side only, and under a strict interpretation of the canons of ethics he is expected to consider primarily the wishes of his client; (2) he usually gets the facts from his client only and thus has an incomplete picture of the total marriage situation; (3) if he turns the client down or suggests waiting to permit counseling, the client often finds another attorney who will immediately begin divorce proceedings; (4) divorces are the bread and butter of some members of the legal profession; (5) if the attorney tries to counsel the client himself and perhaps invites the other spouse in for that purpose, he consumes a great deal of time in a pursuit for which he has little or no training and which yields little financial return; (6) unless he is acquainted with a marriage counselor or a therapist whom he might persuade the client and his spouse to see, he may not relish bringing another professional into his case because it is hard for him to give up the belief that divorces are lawyers' work and a prerogative of the legal profession.

Some lawyers are conscious of the fact that they must now play the dual role of marriage preserver and marriage dissolver, and they do refer more cases for counseling. Legal education is beginning to stress this need...

Bringing the lawyers' dilemma out into the open, does not solve the problem however. The notion of a split role is not to every lawyer's taste. Also, it is often exceedingly difficult for an attorney to determine when it is 'appropriate' to preserve rather than end the marriage, especially when pressed by a client for divorce. Some lawyers feeling the necessity to justify divorce-getting as their primary role, offer such defensive statements as: 'I always counsel my divorce clients first', or 'I never start a divorce action immediately; I always try for a reconciliation first', while, in fact, the counseling effort is often minimal. The lawyer's unfortunate dilemma and his reaction thereto support the conclusion that it 'would appear unduly optimistic to look to the bar to screen out the unwanted, unnecessary, and undesirable divorces.' At the present time, lawyers will screen out some of the needless divorces but not very many of them.

Yet the problem of the ill-considered and avoidable divorce has been placed in the lap of the attorney. Many individuals with troubled marriages will turn to lawyers and the courts rather than to another profession. So the legal profession cannot ignore the problem and must move toward viable solutions."

85. See Andrew Watson, Professor of Law and Psychiatry, "Psychoanalysis and Divorce", The Marriage Relationship (S. Rosenbaum and I. Alger, eds.) at p. 325:

"It is always appropriate for counsel to wonder if the parties really want a divorce. A lawyer may be approached by his client with the underlying and unconscious hope that somehow, through the magic of his role, the lawyer will bring about restitutive change in the marital balance. ...These and other covert goals may enter the office in company with the divorce-seeking client."

86. See text to and contents of footnote 49 supra.
87. See Professor T.J. Wuester, "Some Comments on The Divorce Act, 1968" (1969) 34 Sask. L. Rev. 15; J.D. Payne, "The Divorce Act (Canada), 1968", (1969) 17 Chitty's L.J. 249, 285, 321; Professor B. Green, "The Divorce Act, 1968", (1969) 19 U. of T. Law J. 627; Professor H.A. Hubbard, "Domestic Relations: The Divorce Act, 1968", (1969) 3 Ottawa L. Rev. 172; Professor Brigitte M. Bodenheimer, "The New Canadian Divorce Law" (1968) 2 Fam. L.Q. 213.
88. Divorce Act, 1968, now R.S.C., 1970, ch. D-8, section 8.
89. Ibid., section 7.
90. Fred Reagh, "The Need for a Comprehensive Family Court System" (1970) 5 U.B.C. Law Rev. 13, at p. 34.

See also H.A. Finlay, "Commonwealth Family Courts: Some Legal and Constitutional Implications" (1970-71) 4 F.L.R. 287, at pp. 297-298; J.D. Payne, "Statutory Reconciliation Provisions in Australia and New Zealand" (1968) 11 Can. Bar J. 226; E.J. Griew, "Marital Reconciliation — Contexts and Meanings" (1972) 30 Camb. L. J. 294, at pp. 307-310.

And see David M. Farrell, Consultant, Divorce Counselling Unit, Department of National Health and Welfare, "Results of Questionnaire on Reconciliation counselling" (June 20, 1972):

" In January of 1972 a questionnaire was sent to 121 family service agencies across the country. Some 70 questionnaires were returned, the results of which are summarized below.

Pursuant to Section 7 of the Divorce Act 94 requests for reconciliation counselling were received in the year 1969, 86 in 1970 and 99 in 1971.

Pursuant to Section 8 of the Divorce Act 13 requests for reconciliation counselling were received in 1969, 17 in 1970 and 16 in 1971.

In 106 cases couples decided after no more than three interviews to resume the marriage and to continue counselling. In 32 cases couples decided after not more than three interviews to resume the marriage and to discontinue counselling.

In 55 cases couples decided after not more than three interview to continue counseling with the thought that there was a possibility to resume the marriage at some time in the future.

In 75 cases couples decided, or one of the spouses decided, after not more than three interviews that there was no possibility of reconciliation.

In 71 cases individual spouses decided after not more than three interviews to continue with counselling which was not geared to reconciliation.

91. Attorney William H. Sheridan, Assistant Director, Division of Juvenile Delinquency Services, U.S. Children's Bureau, "Delinquent Children Shortchanged in Juvenile Correctional Program", Trial, Vol. 3, No. 2, February - March, 1967, at p. 48.
92. Judge Paul W. Alexander, "The Lawyer in the Family Court" (1959) 5 N.P.P.A.J. 172.
93. Compare Professor Aidan R. Gough, "A Suggested Family Court System for California" (1964) 4 Santa Clara Lawyer 212, at pp. 214-216:

"Under our present method of pleading in actions for dissolution of marriage or separate maintenance, the plaintiff files a complaint charging his or her spouse with some form of marital misconduct. It has been observed, in testimony before the United States Congress concerning this type of procedure in marriage cases, that 'nothing could be more effectively designed to set the parties at sword's point and preclude any possibility of a friendly conciliation of their difficulties'. In the proposed Family Court system, the initial pleading would be a simple notice of intent to file for divorce (or other form of marital severance). No charges would be levied or grounds set forth...

Upon the return of service of the notice of intent, at least in those cases involving children, the matter would be assigned to a domestic relations counselor on the court's staff, who would prepare an initial report on the possibilities of conciliation. No conciliation efforts would be undertaken without the consent of both parties, and copies of the report would be furnished each party. If conciliation were not achieved, there would be filed by the moving party a petition for divorce or other form of marital severance. This would set forth grounds for dissolution of the marriage, and would be

captioned '*In re Marriage of Jones*', rather than '*Jones v. Jones*'. This petition would be heard in a conference-type hearing, conducted much as juvenile court hearings are presently conducted, and would proceed in the spirit of mediation rather than contest. If the other spouse desired to litigate disputed facts, an answer to the petition could be filed, and the matter transferred to the trial calendar to be heard in the usual way."

See now, Family Law Act (California), 1969, incorporated in sections 4000-5138 of the California Civil Code.

94. William P. Hogoboom, "The California Family Law Act of 1970: 21 Months Experience", *Conciliation Courts Review*, Vol. 9, No. 1, September 1971, at pp. 6 and 8.

Compare William E. MacFaden and Meyer Elkin, "The Case for a Family Court: Progress or Chaos", cited in text and footnote 67, supra.

95. See Royal Commission Inquiry Into Civil Rights, Ontario, 1969, Vol. 2 Ch. 40, Juvenile and Family Courts, at pp. 548-549:

" Although juvenile and family courts are designated as courts of record, they differ from other courts in the judicial system. The social nature of the federal legislation they administer dictates the philosophy for the administration of that Act in express language. [Thus the Juvenile Delinquents Act, R.S.C., 1952, ch. 160, (now R.S.C., 1970, ch. J-3) provides:]

'38. This Act shall be liberally construed to the end that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as is practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.'

17(1). Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances permit, consistently with a due regard for a

proper administration of justice.'

The jurisdiction exercised as a family court has similarly peculiar social functions. Rights and obligations are the subject of adjudication, but at the same time the function and duty of the court is to promote the welfare of the family."

96. The Family Court in Canada, Report of the Canadian Corrections Association and the Canadian Welfare Council, November, 1960, at p. 1.
97. Ibid, at pp. 1 and 3.
98. Chief Judge, H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, at pp. 1-2. See also ibid., at p. 2, wherein Chief Judge Andrews concludes that "[The] present jurisdiction of the court, its structure and its resources are inadequate to respond to the needs of the public," For a detailed analysis of the jurisdiction, structure and resources of the Family Courts and recommendations for necessary changes, see ibid., pp. 3-28.
99. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, at pp. 12-16.

For a detailed summary of the jurisdiction and organization of the Family Court in the Province of Newfoundland, see Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at pp. 2-5, and pp. 15-18.

For a detailed analysis of the jurisdiction and organization of Family Courts in Nova Scotia, see Professor Murray Fraser, "Family Courts in Nova Scotia" (1968) 18 U. Tor. L.J. 164.

For a helpful, if somewhat outdated, list of the statutes administered by Family Courts in the respective provinces, see Report of Canadian Corrections Association and Canadian Welfare Council, The Family Court in Canada, November, 1969, Appendix B.

See also Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, at p. 3:

"The jurisdiction of the Provincial Court (Family Division) falls into three categories:

1. That relevant to the conduct of the child (so-called juvenile delinquent);
2. The conduct of adults towards the child (contributing to juvenile delinquency);
3. The relevant obligations of parents towards one another and their children.

By virtue of the Provincial Courts Act, the court interprets and applies the law contained in the following statutes...

The Criminal Code of Canada

The Juvenile Delinquents Act of Canada

The Training Schools Act

Deserted Wives and Children's Maintenance Act

Reciprocal Enforcement of Maintenance Orders Act

Minors Protection Act

Parents Maintenance Act

Children's Maintenance Act

Child Welfare Act

Schools Administration Act."

For a succinct analysis of the operation of the Family Courts in two major urban centres, namely Toronto and Vancouver, see Fred Reagh, "The Need for a Comprehensive Family Court System" (1970) 5 U.B.C. Law Rev. 13, at pp. 26-33.

100. Report of The Special Joint Committee of The Senate and House of Commons on Divorce, 1967, at p. 150.
101. Herman Litsky, Judge of the Juvenile and Family Courts of Calgary, "Family Courts Belong to The Poor", Canadian Welfare, September-October, 1971, Vol. 47, No. 5, pp. 6-9 and 29.

See also H.A. Allard Family Courts in Canada, Studies in Canadian Family Law, Vol. 1, Ch. 1, at p. 10:

"Family Courts now face the same problems and criticisms which were previously levelled against the Magistrates or the Higher Courts in respect of inadequate staff, high volume of cases, unwarranted delays, and the inability of the judge to devote a special concern to each particular case. There are increasing complaints of inconsistent enforcement and difficulty in gaining access to the courts. Counselling, custody studies, presentence reports, 'intake' inquiries, psychiatric referrals are all essential components to the Family Court philosophy, but such services are not uniformly available. The major activity of Canadian Family Court staff was and still is focussed on the issues of maintenance collection. Even in American courts, which encompass divorce, this is also the case. Divorce cases often by-pass the usual intake arrangements, but the collection of maintenance becomes a time-consuming responsibility of court staff with repeated actions common."

102. Opinions of Elliott Pepper, quoted by Mollie Gillen, "A Lawyer: divorce isn't fair to women", *Chatelaine*, July, 1971, at p. 52.
103. Herman Litsky, loc. cit., Footnote 101 at pp. 9 and 29.
104. Working Paper on the Family Court, (Edmonton: 1972), p. 4. '
105. See Re Vancini (1904), 34 S.C.R. 621; R. v. Hume, [1930] S.C.R. 531.
106. Union Colliery v A.-G. B.C. (1897), 27 S.C.R. 637. See also s. 101 of the B.N.A. Act, 30 & 31 Vict., c.3.
107. A.-G. Ont. and Display Service Co. Ltd. v. Victoria Medical Bldg. Ltd., [1960] S.C.R. 32.
108. Reference re Adoption Act, [1938] S.C.R. 398.
109. Sask. L.R.B. v. John East Iron Works, [1949] A.C. 134 (P.C.)
110. Laskin, Canadian Constitutional Law (rev. 3d.ed.), (Toronto: 1969), 818-820.
111. Re Vancini, footnote 105, supra.
112. Footnote 110, supra.
113. Re Vancini, Footnote 105, supra.
114. E.g., sections 91(26) and 92(12) of the B.N.A. Act.
115. E.g., actions for declaration of invalidity of marriage because of lack of compliance with formalities. This submission is predicated, as was stated above, on the assumption that the grounds upon which these family law matters are determined will not be changed.
116. Footnote 108, supra.
117. Footnote 104, supra, pp. 42-43.
118. Fred Reagh, "The Need for a Comprehensive Family Court System" (1970) 5 U.B.C. Law Rev. 13, at p. 14.
119. P.J.E. Cole, "Family Courts --Their Nature and Function" (1971) 4 Man. L.J. 317, at p. 321, citing Paul W. Alexander, "Legal Sciences and the Social Sciences: The Family Court" (1956) 21 Missouri L.R. 105. See also Paul W. Alexander, "The Family Court — An Obstacle Race?" (1958) 19 Univ. Pitt. L. Rev. 602, 603:

"The most easily distinguishable feature of the family court is the concentration of the handling of all justiciable family conflicts and problems in one court..But it takes something more than a mere concentration of jurisdiction to make a true family court. The power must be undergirded by purpose and implemented by people. The

purpose: to supplement legal science with other social sciences so as to help the court's clients with the kind of help they need. The power: ample legal jurisdiction and authorization. The people: a staff of specially trained and skilled experts in various social sciences and disciplines. A fourth 'P' should be added: Plant. The place where the people have to work has a direct bearing on the results produced."

And see Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205:

"The ideal of a family court has been discussed for many years. Such a court, it is said, should have integrated jurisdiction over all legal problems that involve the members of a family; be presided over by a specialist judge assisted by a professional staff trained in the social and behavioral sciences; and employ its special resources and those of the community to intervene therapeutically in the lives of the people who come before it."

120. Lindsay, G. Arthur, "A Family Court — Why Not?" (1966) 51 Minn. L. Rev. 223, at p. 227.

121. Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at pp. 7-8. See also Professor Henry H. Foster, Jr., "Conciliation and Counseling in the Courts in Family Law Cases" (1966) 41 N.Y. Univ. L. Rev. 353, at p. 354:

"The ideal family court, which has not as yet been established in this country, would have comprehensive and integrated jurisdiction over all or most family problems, employ a professional staff of psychiatrists, psychologists, case workers, marriage counselors, and probation officers, and be committed to the philosophy that its function was to act in the best interests of the family and society. Delinquency, marital difficulties, support problems, and the like, are interrelated and may be facets of a larger family problem. The family court, therefore, should be sociologically oriented, where possible nonpunitive, and should attempt to focus on the overall family problem. Unfortunately, the establishment of an ideal family court, or sometimes any form of a family court, has been stymied by the conservatism of the bar or by courts that refuse to relinquish certain areas of their jurisdiction to a family court."

122. The Family Court Committee, Subcommittee of the Committee to Study Laws Affecting Family Life and Youth, Social Aspects Related to the Establishment of a Family Court in the First Circuit Court of Hawaii, First Draft, December, 1963, at pp. 6-7.
123. Family Court Act, S.L.H., 1965, Act 232, section 333-1. This section corresponds to section 1 of the Standard Family Court Act, which was drafted and proposed by the National Council on Crime and Delinquency in cooperation with the National Council of Juvenile Court Judges and the United States Children's Bureau.
124. Meyer Elkin, Supervising Conciliation Counselor, Conciliation Court of Superior Court of Los Angeles County, "Short-Contact Counseling in a Conciliation Court", Social Casework, April, 1962.
- See also Harry M. Fain, "The Lawyer's Role in California Reconciliation Court Plan", Proceedings of Section of Family Law, American Bar Association, 1962, at p. 212.
125. Report of The Governor's Commission on the Family, California, December, 1966, at pp. 7-8, citing Virtue, Family Cases in Court, 182-201 (1956). See also Richard C. Dinkelspiel and Aidan R. Gough, "A Case for a Family Court - A Summary of the Report of the California Governor's Commission on the Family" (1967) 1 Family L.Q. 70, at p. 73; Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, at p. 1.
- And see Professor Herma H. Kay, "A Family Court: The California Proposal (1968) 56 Calif. L. Rev. 1205, at pp. 1247-1248:

"If the family court is to become truly non-judgmental and oriented to helping each family discover what is in its own best interests, rather than simply prescribing the same cure for all families, 'saving marriages' cannot be the court's primary goal. There must be a frank recognition that 'some marriages are not worth saving, and should be terminated for the welfare of all concerned.' Nor should this recognition be limited to couples without children, for research in California has indicated that couples who are in constant conflict should divorce for the sake of their children, instead of remaining together for the sake of the children. The court's objective, when it is petitioned to inquire into the continuance

of a marriage must be to discover the facts; when the facts lead to the conclusion that the marriage should be dissolved, the court must be prepared to act accordingly. Only in this way will the court's professional staff be free to work honestly with each couple, rather than feeling compelled to produce statistical 'reconciliations' to justify the court's existence. And if, after a full opportunity for reconsideration, one party refuses to continue the marriage at the final hearing, the court will be able to grant a dissolution knowing that it has done what it could for the marriage, and hoping that any future marriages contracted by the divorcing parties will have a better chance for success because of its efforts."

126. See Paul W. Alexander, "Family Cases Are Different - Why Not Family Courts?" (1954) 3 Kansas L. Rev. 26, at pp. 28-29, cited in text to footnote 16, supra.

See also Edward F. Waite, "Courts of Domestic Relations" (1921) 5 Minn. L. Rev. 161, at pp. 164-165, and U.S. Department of Labor, Children's Bureau Publication No. 193, The Child, The Family, And The Court, Washington, 1929, at p. 14, citing the following observations of Judge Harry Fisher of the Municipal Court of Chicago:

"The advantages of having [a Family Court] are in the main the possibility of establishing a social-service department in connection with it, which is required to make investigation of cases and when possible to avoid bringing these matters before the court either by effecting reconciliations or by obtaining voluntary contributions for the support of the families, and to look after a proper collection of the money ordered for the support of wife or child. A separate court for these matters also develops expertness on the part of the judge who is assigned to preside over it. It separates these cases from the other cases that are usually brought before the criminal branches of the court, and, above all, makes it possible to treat these cases from a social point of view. The proceedings are less formal, and the court is not limited to the trial of bare issues of fact. It is in a position to call to its aid the numerous private social agencies which exist in the city and which are able to help solve many domestic problems. In fact, our court has become much more a great social agency than a court. The judicial power is resorted to only where coercion is necessary."

127. See observations of Judge Harry Fisher, footnote 126, supra.
128. Dean Roscoe Pound, "The Place of the Family Court in the Judicial System" (1959) 5 N.P.P.A.J. 161, at p. 167.
129. Professor John J. Horwitz, School of Social Welfare, S.U.N.Y., "The Problem of the Quid Pro Quo" (1963) 12 Buffalo L. Rev. 528, at pp. 534-535.
130. Commission on Children and Youth, State of Hawaii, A Proposal For the Establishment of a Family Court in the First Circuit Court of Hawaii, Report No. 28, July, 1964, at p. 1.
131. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J. Family L. 505, at p. 578.
132. Goldberg, H.L. and Sheridan, W.H. "Family Courts - An Urgent Need" (1959) 8 J. Public L. 537. See also James C. MacDonald, "A Comprehensive Family Court" (1967) 10 Can. B.J. 323, at p. 331; Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, at p. 2, cited in text to footnote 98 supra. And see text supra, JUDICIAL OR ADMINISTRATIVE PROCESS, sub-heading "Arguments against administrative process".
133. Louis Lauer, "New Directions for Court Treatment of Youth" (1963) 12 Buffalo L. Rev. 452, at p. 460, citing N.Y. Joint Legislative Committee on Court Reorganization, Rep. II (The Family Court Act) 9 (1962).
134. Putting Asunder: A Divorce Law For Contemporary Society, Appendix C, at p. 134, S.P.C.K. (London), 1966.
135. Dean Roscoe Pound, "The Place of the Family Court in the Judicial System" (1959) 5 N.P.P.A.J. 161, at p. 169. See James C. MacDonald, "A Comprehensive Family Court" (1967) 10 Can. B.J. 323, at pp. 331-332, and P.J.E. Cole, "Family Courts - Their Nature and Function" (1971) 4 Man. L.J. 317, at p. 333, wherein the observations and conclusions of Dean Roscoe Pound are cited with approval.

See Professor Aidan R. Gough, "A Suggested Family Court System for California" (1964) 4 Santa Clara Lawyer 212, at pp. 213-214:

"In addition to having integrated jurisdiction over family cases, the Family Court would adopt a conference or non-adversary procedure, save in those cases where a spouse demanded an adversary hearing for the finding of disputed fact. The investigative staff of the Family Court would examine the cases referred to it to determine the possibilities for reconciliation, and undertake to exploit them; it could also provide information leading to surer and more amicable settlement of family problems other than divorce."

See also "The Family in the Courts" (1955-1956) 17 Univ. Pitt. L. Rev. 206:

"The group also believed that the procedure of such a court should be patterned after equity procedure and that prevailing in the juvenile court. However, flexibility should be achieved and the type of procedure employed should depend primarily upon the type of case and its disposition. Rules of evidence should be more rigidly adhered to in contested divorces or contested juvenile delinquency cases, and in any event parties concerned and their counsel should have an opportunity to see in advance the reports of court personnel so that there may be a refutation of any errors or inaccuracies. It is recognized that two important values are at stake, on the one hand a family court, to be effective, needs the information made available by reports and investigations, on the other hand, to insure fairness and to elicit facts such investigations and reports should be subject to correction and review."

And see U.S. Department of Labor, Children's Bureau Publication No. 193, The Child, The Family, And The Court, Washington, 1929, at p. 62:

"Great need exists for extending the new judicial technique as rapidly as possible to matters bearing upon family relations that come within the scope of this report. This technique includes informal adjustment of cases not requiring official court action, thorough social investigation, physical and psychiatric examinations when necessary, informal hearings conducted with a minimum of publicity, and constructive supervision of probationers. Without doubt the ideals of justice can be achieved more nearly by these methods properly administered than by wholly legalistic methods of dealing with these cases."

136. Judge Paul W. Alexander, "The Family Court - An Obstacle Race?" (1958) 19 Univ. Pitt. L. Rev. 602, at p. 605, citing A Guide to the Japanese Family Court, Supreme Court of Japan, March, 1953, p. 8. See also Judge Paul Alexander, "Family Cases are Different - Why Not Family Courts?" (1954) 3 Kansas L. Rev. 26:

"The court within would have plenty of the new look, too. With simple, conference-like procedures, absence of ceremony, forensic

battles, sensational dramatics, or crowds of spectators, it wouldn't look like the kind of court we are used to. But it would be a court, nevertheless -- a modern family court."

137. Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at pp. 9-11.
138. Professor Murray Fraser, "Family Courts in Nova Scotia" (1968) 18 U. Tor. L.J. 164, at p. 168.
139. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J.Family L. 1, at p. 65.
140. Canadian Corrections Association and Canadian Welfare Council, The Family Court in Canada, November, 1960, at p. 4, para. 7.
141. 387 U.S. 1 (1967).
142. Royal Commission Inquiry Into Civil Rights, Ontario, 1969, Vol. 2, Ch. 40, Juvenile and Family Courts, at pp. 553-556. See also text to footnote 134 and 146.
143. See footnote 144, infra.
144. Family Court Act (Hawaii), Act 232, S.L.H. 1965, section 333-19. Section 333-8(a), which is referred to in section 333-19, regulates proceedings involving the violation of federal, state and local laws and section 333-8(b) relates to proceedings involving child neglect, custody, guardianship and adoption of children, the termination of parental rights, and the treatment or commitment of children who are mentally disabled.

For provisions regulating the procedure in criminal proceedings involving adults, see ibid., section 333-20:

" Sec. 333-20. Procedure in adult cases. In any criminal proceeding arising under section 333-11 the court, with the consent of the defendant or the parties in interest, may make a preliminary investigation and such adjustment as is practicable, without prosecution. The procedure and disposition applicable in the trial of such cases in a criminal court shall be applicable to any trial in the family court. On request of the court, the appropriate prosecuting officer shall prepare and prosecute any criminal case within the purview of section 333-11.

Where in his opinion it is necessary to protect the welfare of the persons before the court, the judge or referee may conduct hearings

in chambers, and may exclude persons having no direct interest in the case.

In proceedings arising under subsection (c), (d) or (e) of section 333-11 the court may also make a preliminary investigation and, with consent of the parties in interest, may make such adjustment as is practicable without further formal procedures."

The provisions of section 333-19 and section 333-20 of the Family Court Act (Hawaii), supra, are modelled closely upon sections 19 and 20 of the Standard Family Court Act, which was proposed and drafted in 1959 by the National Council on Crime and Delinquency in cooperation with the National Council of Juvenile Court Judges and the United States Children's Bureau.

145. See text to footnote 142, supra.
146. See Draft Family Relations Act and Rules of Practice Thereunder Prepared for Discussion by the Rules Committee, Provincial Council (Family Division), Province of Ontario, 1972.
147. Dean Roscoe Pound, "The Place of the Family Court in the Judicial System" (1959) 5 N.P.P.A.J. 161, at p.
148. Lindsay G. Arthur, "A Family Court — Why Not?" (1966) 51 Minn. L. Rev. 223, at pp. 231-232. See also P.J.E. Cole, "Family Courts— Their Nature and Function" (1971) 4 Man. L.J. 317 at pp. 332-334.
149. See Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at pp. 1244-1245:

"This problem is touched on in one of the most witty and perceptive essays currently available dealing with divorce policy. [C. Foote, R. Levy and F. Sander, Cases and Materials on Family Law, 1966, at pp. 769-795]. The essay is written in the form of an imaginary quadrilogue between the American delegates (a judge, professor, psychiatrist, and bishop) to the hypothetical First International Interdisciplinary Congress on Family Stability and the Rights of Children...Toward the end of the end of the essay, the professor comments on the judge's proposal for marriage counseling offered through the courts:

'...the implicit premise of the counseling approach seems to be that it is individual failure which causes our high breakdown rate. That is really the same basic error as that into which I feel the Bishop has fallen, the only difference being that the Bishop's root cause is immorality and the Judge's is psychopathology.'

The psychiatrist states his agreement with this point and adds,

'Kubie has pointed out that it is destructive social forces in our society and not individual psychopathology which threaten the family. It seems obvious to me that Kubie is right when he says that psychiatry—and by that I take it he also includes all forms of counseling help—can't roll a ball uphill when everything else in society is conspiring to roll it down. The real danger I see in both the Judge's and Bishop's approaches is that by their emphasis on false issues they keep us from tackling the basic problems of family life in modern society.'"

- 150. U.S. Department of Health, Education and Welfare, Children's Bureau Publication No. 437-1966, Standards for Juvenile and Family Courts, at pp. 79-80.
- 151. Ibid, at pp. 88-89.
- 152. Family Court Act (Hawaii), Act 232, S.L.H., 1965, section 333-21.

Compare Rule 15, Draft Family Relations Act and Rules of Practice Thereunder Prepared for Discussion by the Rules Committee, Provincial Court (Family Division), Province of Ontario, 1972:

"15. A proceeding shall not be defeated by any formal objection but all necessary amendments shall be made, upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining of the real matter in dispute, the giving of judgment according to the very right and justice of the case."

153. Richard C. Dinkelspiel and Aidan R. Gough "The Case for a Family Court -- A Summary of the Report of California Governor's Commission on The Family" (1967) 1 Family Law Qtrly. 70, at pp. 74-75. See also P.J.E. Cole, "Family Courts -- Their Nature and Function" (1971) 4 Man. L.J. 317, at pp. 333-334.
154. As to the jurisdiction of the Superior Court to order a referral of the parties to the Conciliation Court, see California Code of Civil Procedure, sections 1771 and 1772.
155. See text to footnote 154, supra.
156. Elloeen D. Oughterson, "Family Court Jurisdiction" (1963) 12 Buffalo L. Rev. 467, at p. 472.
157. See also Criminal Code, R.S.C., 1970, ch. C-34 section 271(1):

" 271.(1) No person shall be deemed to publish a defamatory libel by reason only that he publishes in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons or a legislature, or a committee thereof, or of the public proceedings before a court exercising judicial authority, or publishes, in good faith, any fair comment upon any such proceedings."

Compare Reports of Judicial Proceedings Act, R.S.A., 1970, ch. 320.

158. For cases arising under the Family Court Act, R.S.A., 1970, ch. 133, see section 4(1) and (2):

"4.(1) The Lieutenant Governor in Council may appoint any magistrate as a judge of the Family Court.

(2) Notwithstanding the provisions of **any** other Act, the Lieutenant Governor in Council by order may confer on a named judge of a Family Court exclusive original jurisdiction or joint or general jurisdiction over any or all of the following matters:

(a) maintenance order for deserted wives and families under section 27 of *The Domestic Relations Act*;

(b) maintenance orders made against any person by a court in a reciprocating state and enforceable under *The Reciprocal Enforcement of Maintenance Orders Act*;

- (c) charges against adult persons under *The School Act* for failure to cause a child to attend school and continue in regular attendance thereat;
 - (d) hearings under Part 2 of *The Child Welfare Act*;
 - (e) charges triable on summary conviction under section 186, subsection (2), paragraph (a) of the *Criminal Code*;
 - (f) charges of common assault triable on summary conviction under section 231, subsection (1) of the *Criminal Code* where a husband assaults a wife, a wife assaults a husband or a parent assaults a child;
 - (g) charges triable on summary conviction under **any** other Act or section where, in the opinion of the Lieutenant Governor in Council, it is appropriate for the judge of a Family Court to deal with them."
159. Compare Domestic and Appellate Proceedings (Restriction of Publicity) Act (England), 1968, section 1. See generally, The Law Commission (England), Report on the Powers of Appeal Courts to Sit in Private and the Restrictions upon Publicity in Domestic Proceedings, Cmnd. 3149, November, 1966.
160. See *Regina v Gerald X (or G.S.)* (1958) 25 W.W.R. (N.S.) 97, at pp. 112-113, 23 C.R. 100, at p. 112 (Man. C.A.) (per Adamson, C.J.M.); *Rex v H. and H.* [1947] 1 W.W.R. 49, at pp. 54-56, 88 C.C.C.8, at pp. 13-16 (B.C.S.C.) (per Manson, J.).
161. Report of Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, at pp. 139-142, paras. 240-245. For a summary of the recommendations for revision of the existing statutory provisions, see *ibid.*, at p. 290, paras. 46-48:

" 46. It should be made clear in any revision of the Act that the ban on the identification of a child who may be the subject of proceedings under the Act by 'any newspaper or other publication' extends also to radio and television. Legislation should provide also that the identification of a child is prohibited in any criminal proceedings involving a child, whether brought in the juvenile court or the adult court, where the proceedings arise out of an offence against, or conduct contrary to, decency or morality. The prohibition against identifying any such child should be reinforced by adequate penalty provision under the law (paras. 241, 244.)

47. Representatives of the news media should be permitted to attend juvenile court hearings as of right and, except where expressly prohibited by the judge, should be permitted to report the evidence adduced at the hearing, subject to the prohibition against identifying any child before the court, or any child said to have committed an offence (para. 244.)
48. Members of the public should not be permitted to attend proceedings in a juvenile court, but the judge should be authorized to permit any member of the public to attend where he is satisfied that such a person has a bona fide reason to be present (para. 245)"
162. See text to footnote 136, supra.
163. See text and contents of footnote 144, supra.
164. Hawaii Sess. Laws, 1965, Act 76, approved May 11, 1965.
165. Commission on Children and Youth, State of Hawaii, Report No. 29, November, 1964, at p. 3.
See also the Honorable Gerald R. Corbett and the Honorable Samuel P. King, "The Family Court in Hawaii" (1968) 2 Family L.Q. 32, at p. 38:
- " A major improvement was the repeal of a statutory requirement that divorces could only be granted upon testimony publicly in open court. Now all divorce hearings are held in private—not in secret, but in private."
166. Family Court Act (Hawaii), Act 232, S.L.H., 1965, section 333-39.
167. St. Fam. Act. Act §§ 20 (adults) and 19 (children); Hawaii Rev. Laws §§ 333-20 (adults) and 333-19 (children) (Supp. 1965); N.Y. Family Ct. Act §§ 433 and 531 (support and paternity cases) and 343(b) and 741(b) (neglect and JD-PINS cases) (McKinney 1963); R.I. Gen. Laws Ann. § 14-1-30 (1956) (adult cases within purview of juvenile code and children's cases). It has been observed that the right to private hearings is sometimes more theoretical than real; in one of New York City's family courts, for example, "all sorts of court attendants and probation officers come and go during a hearing. Respondents, I am certain, would be surprised to learn that the proceeding is a 'private' hearing." M. Paulsen, "Juvenile Courts, Family Courts, and the Poor Man", 54 Calif. L. Rev. 694, 694-5 (1966).
168. St. Fam. Ct. Act § 33; Hawaii rev. Laws § 339-39 (see also § 333-31) (Supp. 1965); N.Y. Family Ct. Act, § 166 (McKinney 1963). Compare R.I. Gen. Laws Ann. § 8-10-21 (Supp. 1967).
169. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at p. 72.

170. U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at pp. 76-77. Compare U.S. Department of Health, Education and Welfare, Children's Bureau Publication 472-1969, Legislative Guide for Drafting Family and Juvenile Court Acts, sections 29 and 51. And see U.S. Department of Labor, Children's Bureau Publication No. 193, The Child, The Family, And The Court, Washington, 1929, at pp. 41-42, wherein an analysis of the then existing practices is included and it is recommended that "[hearings] should be held promptly, and unnecessary publicity and formality should be avoided". And see Geis, Gilbert, "Publicity and Juvenile Court Proceedings", 30 Rocky Mt. L. Rev., 101, 1958; Code of Confidentiality, The Committee on Juvenile Delinquency of the American Bar Association, May, 1963; Guides for Juvenile Court Judges on News Media Relations, N.C.C.D. Advisory Council of Judges, N.Y.
171. U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966 Standards for Juvenile and Family Courts, at pp. 116-118.

For corresponding safeguards respecting the protection of legal records on appeals, see ibid., at p. 79:

" Safeguards, similar to those established by the specialized court to protect the legal records in certain types of children's cases should be established with respect to the legal records on appeals. Such safeguards should extend to the reported decisions through the use of some such device as reporting the child's first name only or the first initial of the child's surname."

See also U.S. Department of Health, Education and Welfare, Children's Bureau Publication 472-1969, Legislative Guide for Drafting Family and Juvenile Court Acts, Sections 45-48.

172. Report of the Governor's Commission on the Family, California, 1966, at p. 21.

See also H. Goldberg and W. Sheridan "Family Courts - An Urgent Need" (1959) 8 J. Pub. L. 537, at pp. 548 and 549:

" Family litigation requires privacy of hearings, and therefore, the general public should be excluded.

The importance of protecting records is stressed in the [standard] Family Court Act. It provides that the judicial records are to be protected as also are reports of social and clinical studies and examinations. Protecting the privacy of children and families is vital for their welfare and that of the community."

As to confidentiality of court files and records, see Report of Subcommittee on the Conciliation Court to Matrimonial Actions Committee, Family Law Section, American Bar Association, June, 1961, at p. 9, para. 6:

" 6. The court files, including the counselors' written reports, and all written and oral communications to the counselors, should be made confidential by law. Counselors maintain strict neutrality, thus providing a uniqueness and integrity to the proceedings which immediately instills confidence and trust in the parties."

- 173. Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at p. 10.
- 174. Ibid, at p. 24.
- 175. Presumably, such a distinction was not perceived in the Newfoundland study: see text to footnotes 173 and 174, supra.
- 176. Canadian Corrections Association and Canadian Welfare Council, The Family Court in Canada, November, 1960, at p. 4, para. 8.
- 177. See "The Standard Family Court Act Appraised" (1959-60) 35 Indiana L.J. 462, at p. 463, citing Kephart, "The Family Court - Some Socio-Legal Implications" (1955) Wash. U.L.Q. 61, at p. 65:

" The ability of a family court to gather statistical information from which 'causal' inferences can be drawn relative to marital disruption is suggested as an argument in its favor by Kephart who is not exactly one of its protagonists. Kephart says the 'serious flaw' in the 'statistical argument' is that the integrated family courts now existing do not, in general, utilize this opportunity. The 'serious flaw' is overcome by the Standard Family Court Act as it requires the Board of Family Court Judges to publish an annual report which includes statistical and other **data** on the court's work."

See also "The Family in the Courts" (1955-56) 17 Univ., Pitt. L. Rev. 206, at p. 253:

"One of the principal benefits to be derived from a family court is that there will be a central agency which will serve as a repository for all reports on families and such reports will be available in subsequent cases. The

present situation, where one court may have no knowledge as to the proceedings or records of another court, would be eliminated."

And see Professor John Bradway, "Divorce Litigation and the Welfare of the Family" (1956) 9 Vand. L. Rev. 665, at p. 677,

178. U.S. Department of Labor, Children's Bureau, Publication No. 193, The Child, The Family, And The Court, Washington, 1929, at p. 45. See also text to and contents of footnote 171, supra.

179. Ibid., at pp. 45 and 46.

180. Ibid., at p. 52:

" Few courts of any type are equipped to do research work. Child-guidance clinics working with juvenile courts in a number of communities have been accumulating information concerning the causes and methods of treatment of delinquency which is invaluable as a basis for developing programs of treatment and prevention. In the field of marital maladjustments and other domestic difficulties research is equally necessary, but as yet little has been attempted. ...

As the child-guidance movement has been initiated and for the most part carried on by private effort, so might non-governmental endeavour be directed toward the establishment of domestic-relations clinics, possibly in connection with legal-aid bureaus. These clinics should be equipped to render diagnostic service and unofficial assistance in the medical, psychiatric, and social fields of those asking help in solving difficulties connected with marital or other family relations or referred by courts of such service. Such organizations, besides being of immediate assistance to the families with which they came in contact, would make available for the first time a factual basis for programs of prevention and treatment and for measurement of the efficiency of legal and nonlegal institutions as agencies dealing with family maladjustments."

181. U.S. Department of Health, Education and Welfare, Children's Bureau Publication No. 437-1966, Standards for Juvenile and Family Courts, at pp. 118-119.

182. John C. Scanlon and Kenneth Weingarten, "The Role of Statistical Data in the Functioning of the Courts" (1963) 12 Buffalo L. Rev. 522, at pp. 522-523. See also ibid., at p. 527, citing Thorsten Sellin, "The Uniform Criminal Statistics Act" (1950) 40 J. Crim. L.C. & P.S. 679, at p. 680:

" The need for a detailed statistical monitoring system which we have been advocating was aptly expressed by Thorsten Sellin:

'We have created a vast network of official agencies to bring offenders to justice to determine their guilt, to impose penalties, and to administer penal or correctional treatment. The operation of these agencies, the manner in which they apply policies dictated by law, and their relations to offenders in their charge are phenomena concerning which we are poorly informed. Some of the problems involved have been laid bare by various local and state surveys of criminal justice or by piecemeal research, but what is needed as a basis for administrative improvements is a permanent system of social accounting in this field. The statistical analysis of administrative processes offers the soundest basis for administrative reform. Archaic and ineffective methods of dealing with offenders would have less chance of survival in law and practice had their nature and operation been the object of continuous statistical scrutiny.'

183. Justine Wise Polier, A View From The Bench, National Council on Crime and Delinquency, 1964, at p. 60. See also text to and contents of footnote 213, infra.
184. General Assembly of the Commonwealth of Pennsylvania, Joint State Government Commission, Proposed Marriage and Divorce Codes for Pennsylvania, June, 1961, at pp. 89-90.
185. Ibid., at pp. 91-92.
186. See S.O.R. 200-68.
187. P.J.E. Cole, "Family Courts — Their Nature and Function" (1971) 4 Man. L.J. 317, at pp. 340-341.
188. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J. Family L. 505, at pp. 583-584.

189. See supra, BIPARTITE STRUCTURE AND FUNCTION OF FAMILY COURTS, text to footnote 126 et seq.
190. Professor Murray Fraser, "Family Courts in Nova Scotia" (1968) 18 U. Tor. L.J. 164, at p. 168.
191. Judge Paul W. Alexander, "Family Cases Are Different—Why Not Family Courts?" (1954) 3 Kansas L. Rev. 26, at p. 31.
192. Report of The Governor's Commission on The Family, California, 1966, at pp. 11-12. See also Richard C. Dinkelspiel and Aidan R. Gough, "A Case for a Family Court — A Summary of the Report of the California Governor's Commission on the Family, (1967) 1 Family L. Q. 70, at pp. 73-74.

And see Commission on Children and Youth, State of Hawaii, A Proposal for the Establishment of a Family Court in the First Circuit of Hawaii, Report No. 28, July, 1964, at pp. 2-3:

"The family court, like any other court of record, adheres to basic legal principles and assures due process in its procedures. This is done, however, in an informal way rather than with strict adherence to traditional rules of criminal and civil procedure. Specialized services are used extensively to assist the court in its decisions since all cases brought before the family court have social ramifications. For example, in divorce cases involving the custody of children, the children often become pawns in bitter battles between the spouses while the children's interests are overlooked. And in most cases, even in uncontested cases, the judge has difficulty in determining on the basis of evidence presented under the usual rules, whether the petitioning spouse is a proper person to have custody of the children. Frequently the petitioning spouse is given custody on the assumption that he is not at fault. Controversies with respect to the right to visit children, support, and custody often continue for long periods. If the children's best interests are to be adequately protected, all of these determinations call for objective knowledge of the case through the use of social studies conducted by a specialized staff.

It is vital that a family court always be mindful of the rights and responsibilities of parents in its attempt to protect the interests of children. The State, as *parens patriae*, can involve itself in a family situation only when it becomes apparent that the parents have been unable

or unwilling to carry out their responsibilities. The court must be mindful, also, of the State's responsibility to protect the children and to assure that they are properly supported. Thus, in the interest of the public as well as the children, the judge needs all the relevant information he can get from a person not involved in the proceedings and who is qualified by training and experience to secure it objectively."

193. William J. Moshofsky, "A Proposal to Improve Court Services To Families and Children in Oregon" (1966) 46 Oregon L. Rev. 77, at pp. 79-81.
194. U.S. Department of Labor, Children's Bureau Publication No. 193, "The Child, The Family, And The Court", Washington, 1929, at p. 51.
195. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, at pp. 66-96.
196. Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at pp. 7-8. See text to footnote 121 supra.
197. Ontario Family Law Project, Vol. X, Family Court and Social Services, 1969.
198. Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, at pp. 6-28.
199. Report of The Governor's Commission on the Family, California, 1966, at pp. 13-14. See Richard C. Dinkelspiel and Aidan R. Gough, "A Case for a Family Court — A Summary of the Report of the California Governor's Commission on the Family" (1967) 1 Family L.Q. 70, at p. 74.

See also Stephen C. O'Connell, Justice, Supreme Court of Florida, "Divorce—A Public or Private Affair?", Proceedings of Section of Family Law, American Bar Association, 1965, at pp. 44-45:

"Those who would argue that the use of counseling and that conciliation is just another do-gooder social welfare gimmick at the expense of the public treasury forget that, rightly or wrongly, the public is now picking up a tab for the results of broken homes that runs into astronomical figures. Business judgement, if nothing else, demands we reduce this tab by every reasonable practical means and a simple one is available."

And see Dale Evavold, "Family Courts in North Dakota" (1968-69) North Dak. L. Rev. 281, at pp. 281-282.

"[The] social and economic problems raised by family dissolution are still considerable in North Dakota, and the divorce rate has been increasing, both within the state and on the national level. Broken homes are costly, not only to the immediate parties involved but also to society as a whole. In fiscal year 1965, \$4,195,784 was provided in aid to families with dependent children in North Dakota. It is clear that in many of these cases support was necessitated by unresolved marital difficulties. In the same fiscal year the Public Welfare Board reported that 721 children received attention from the board because of parental neglect, abuse or exploitation. Furthermore, 987 children were in need of substitute parental care. The inevitable conclusion is that there is a serious and expensive problem."

- 200. Report of Joint Legislative Committee On Matrimonial and Family Laws, State of New York, 1958, at p. 60.
- 201. Fred Reagh, "The Need For A Comprehensive Family Court System" (1970) 5 U.B.C. Law Rev. 13, at pp. 14-15.
- 202. William J. Moshofsky, "A Proposal to Improve Court Services to Families and Children in Oregon" (1966) 46 Oregon L. Rev. 77, at pp. 86-87.

See also "The Standard Family Court Act Appraised" (1959-60) 35 Indiana L.J. 464, at p. 470:

"The National Probation and Parole Association used the general principles of the Standard Family Court Act in planning a statewide system of family courts for North Carolina. The total estimated cost for the entire state system was \$2,719,500 which was not believed to be a net increase over the present expenditure. This would be a cost of 63¢ a year per capita, but the cost of crime is so monstrous that 'the family court system would have to save only one child out of every 190 headed for a career of crime in order to balance its books.' If these statistics are reasonably accurate, it is clear that the cost is not prohibitive when the need for a reduction of expensive social problems is considered."

- 203. Report of New Jersey Family Court Study Commission, March 27, 1972, at p. 10.

204. U.S. Department of Labor, Children's Bureau Publication No. 193, "The Child, The Family, And The Court", Washington, 1929, at pp. 51-52.
205. Standards for Juvenile and Family Courts, U.S. Department of Health, Education and Welfare, Children's Bureau Publication No. 437-1966, at pp. 122-123.
206. Supra, footnote 172, "Family Courts—An Urgent Need" (1959) 8 J. Pub. L. 537, at p. 546.
207. P.J.E. Cole, "Family Courts—Their Nature and Function" (1971) 4 Man. L.J. 317, at pp. 329-331. See also Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J. Family L. 505, at pp. 522-524.
208. H. Goldberg and W. H. Sheridan, "Family Courts -- An Urgent Need" (1959) 8 J. Pub. L. 537, at p. 544.

See also William H. Sheridan, Assistant Director, Division of Juvenile Delinquency Services, U.S. Children's Bureau, "Structuring Services for Delinquent Children and Youth", Federal Probation, September, 1967, Vol. 31, No. 3, at p. 56:

" Some structures for delivering services to delinquent youth appear to have advantages over others, and no single pattern can be recommended for all the states—characteristics peculiar to each must be taken into consideration. But, in this process, *tradition and vested interests must now give way to change and creativity.*"

209. U.S. Department of Labor, Children's Bureau Publication No. 193, "The Child, The Family, And The Court", Washington, 1929, at pp. 50-51. See also ibid., at p. 53:

" It is necessary in considering each type of case to bear in mind, as has been emphasized in this report, that the program for a given community must be based upon careful analysis of local conditions and adaptation of general principles to local needs. The family-court movement is still in an experimental stage, and no final statement of principles with reference to the scope of the new courts can yet be made. In fact, in this stage of development it matters little what aspects of the family problem are brought within the jurisdiction of the new courts in various localities so long as effective standards of dealing with the problems selected are developed.

In the opinion of the writers any attempt to judge the efficacy of existing courts by a standardized outline of a so-called model court would be actually detrimental. Experiments in the treatment of the different types of cases coming within the general scope of this report are greatly to be desired, and local situations must determine the parts of the problem to be attacked first. It is extremely helpful to the whole movement, for example, when a court in one locality undertakes a demonstration of what socialized treatment of nonsupport cases really involves, while a court in another community may be developing such methods of cooperation with courts having divorce jurisdiction as will insure adequate treatment of matters affecting the custody and welfare of the children involved.

In considering any particular type of case with reference to any given local situation the first question to answer is 'How can adequate administrative standards be developed best in this field?' When careful study of existing conditions indicates that further advance is possible in the direction of socialized treatment of family problems certain general considerations applicable to the various subjects coming within the jurisdiction of family courts in different communities may be helpful."

210. Ibid., at p. 62.

211. Professor Henry H. Foster, Jr., "Conciliation and Counseling in the courts in Family Law Cases" (1966) 41 N.Y. Univ. L.R. 353 at pp. 376, 377.

212. "The Standard Family Court Act Appraised" (1959-60) 35 Indiana L.J. 462, at p. 463.

For criticism of the system in the State of Oregon where local government assumed the responsibility for providing auxiliary services and for submissions respecting the need for a state-wide system to provide adequate auxiliary services, see William J. Moshofsky "A Proposal to Improve Court Services to Families and Children in Oregon" (1966) 46 Oregon L. Rev. 77, at pp. 81-82:

"NCCD Recommendations. Staff court services must be provided for many kinds of family - related cases in which they are not now provided and must be strengthened where efforts are now being made to provide such services. Overall sustained improvement in court staff services can be accomplished only through an integrated statewide system, with state financial assistance.

Comment on Recommendations. Adequate staff to handle family-related cases (which would be concentrated in the circuit court under the preceding recommendation) is clearly necessary. The problem is how to achieve this goal. The NCCD believe it can be achieved only by establishing an integrated state-wide system with the state's becoming involved and assuming major financial responsibility. It gives three basic reasons for the state's assuming a major role. First, a study of Oregon's tax structure and traditions indicates local governments alone cannot be expected to support the needed programs. Second, there are already enormous variations from county to county in the quality and quantity of these court services and facilities which are now required. The disparity will likely become even greater if services are required for all 'family' cases, unless the state becomes involved. Third, effective and economical transition to an improved system will require a great deal of inter-county coordination and cooperation on a regional basis. This is most difficult to achieve without state involvement and financing.

The NCCD recommended as one solution a state-controlled and state-operated system for providing services to the courts under a seven-man commission appointed by the governor.

The Oregon Council on Crime and Delinquency, after extensive study, discussion, and consultation with judges, court personnel, other government leaders and many interested citizens, recommends first that the NCCD's program be modified to preserve local circuit judge supervision and control of court staff with the state function to be limited largely to planning, coordinating, training, standard setting, and allocating state funds' and second, rather than establishing a new commission at the state level, a court services department be set up under the board of control as a part of the corrections division.'

Until the Provincial Courts Act, 1968 [now R.S.O., 1970, ch.369], the provision of essential resources in the Juvenile and Family Courts of Ontario was the responsibility of individual municipalities and counties. For trenchant criticism of this system, see Royal Commission Inquiry Into Civil Rights, Ontario, 1969, Vol. 2, Ch. 40, Juvenile and Family Courts, at pp. 568-570. Informed opinion suggests that the enactment of the Provincial Courts Act, 1968 has not resulted in improvement of the resources of the Juvenile and Family Courts of Ontario: see Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, at p. 6 et seq.

213. Family Court Act (Hawaii), Act 232, S.L.H., 1965, section 333-5. Compare Standard Family Court Act, 1959, section 5 (N.C.C.D.).
214. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, at pp. 48-49.
215. Report of Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, at pp. 131-132, para. 223. See also Royal Commission Inquiry Into Civil Rights, Ontario, 1969, Vol. 2, Ch. 40, Juvenile and Family Courts, at p. 569, wherein it was recommended that judges of the Juvenile and Family Courts should be employed on a full-time basis and function itinerantly within their judicial districts to accommodate the needs of rural and outlying areas.
216. As to the inequality of services between urban and rural districts in the United States, see H. Goldberg and W. Sheridan, "Family Courts — An Urgent Need" (1959) 8 J.-Pub. L. 537, at p. 539:

"Larger urban areas have had some tendency to place the specialized court, family or juvenile, at a somewhat higher jurisdictional level. As a result, inequality in the caliber of justice has arisen between urban and rural jurisdictions.

Effective operation of a specialized court means the use of specialized services — social, medical, psychiatric, and psychological. Without such services, it is a specialized court in name only. Great disparities exist in this area. Again, such services are usually available to some degree in courts serving large urban areas. However, in the great majority of courts serving smaller communities and rural areas, they are either non-existent or woefully inadequate.

Even in urban communities these services may be segmented in that they are attached to several different courts working independently without effective avenue of communication.

Because of the shortage of trained personnel, change in structure and organization alone will not assure complete coverage of services. This should, however, make for more efficient and effective use of existing personnel and help to meet the great inequalities between jurisdictions in the present availability of services."

217. Donald M. McIntyre, "Conciliation of Disrupted Marriages By or Through the Judiciary" (1964) 4 J. Family L. 117, at pp. 125-126.
218. See Report of The Divorce Counselling Unit, Department of National Health and Welfare, to Law Reform Commission of Canada, October, 1972, at p. 3:

"In 1971 the Department of National Health and Welfare commissioned Dr. Frank Fidler of Toronto to do a study on marriage counselling in England, Australia and New Zealand, with particular emphasis on the use made of volunteer counsellors in those countries. His report provides valuable new insights on the potential for marriage counselling in Canada and has led to consideration of ways and means of introducing the concept of volunteer counselling in Canada as a means of providing counselling at minimum cost."

Additional research studies, demonstration projects and workshops for 1972-73 acknowledged by the Department of the Solicitor General include the following: University of Ottawa, Project to demonstrate the role and need for volunteers working with probation officers in connection with the Ottawa Juvenile Court; Manitoba Society of Criminology, Workshop on the use of volunteers in probation programmes in Canada; Department of Health and Social Services, Government of Manitoba, Demonstration project to develop from experience the ability to involve communities in volunteer programmes for juveniles and to develop a system of assessment, selection and training of volunteers; Y.M.C.A., Montreal, Project to evaluate the street-work approach to juvenile delinquency versus the more structured system operating in most cities.

219. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972.
220. Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969.
221. See infra, text to footnotes 222 and 223.

222. Ontario Family Law Project, Vol. X, Family Court and Social Services, 1969, at pp. 237-238. See contents of footnote 212, supra.
223. Ibid., at p. 241. See also Chief H.T.G. Andrews, loc. cit., supra, footnote 212.
224. Oral Submission by J.D. Payne, Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, March 14, 1967, at pp. 1318-1319.
225. See text infra.
226. U.S. Department of Labor, Children's Bureau Publication No. 193, The Child, The Family, And The Court, Washington, 1929, at p. 17.
227. See text supra, CRITICISMS OF EXISTING PROCEDURES IN THE SUPREME COURT.
228. See text supra, FRAGMENTATION OF JURISDICTION.
229. Professor Aidan R. Gough, "A Suggested Family Court System for California" (1964) 4 Santa Clara Lawyer 212, at p. 214. See also Richard A. Dinkelspiel and Aidan R. Gough, "A Case for a Family Court — A Summary of the Report of the California Governor's Commission on the Family" (1967) 1 Family L.Q. 70, at pp. 71-72:

" Broadly put, the Commission took as its goal the establishment of procedures for the handling of marital breakdown which would allow the court to make a full and proper inquiry into the real problems of the family before it. Such procedures would eliminate insofar as possible the divisiveness and acrimony of the present accusatorial system of pleading and proof and its concept of fault as a determinant of divorce and its consequences. To be effective, the legal process for handling family matters must enable the court to focus its resources upon the actual difficulties confronting the parties, and must at the same time safeguard their rights and preserve the confidentiality of the information thus acquired...The Commission found widespread agreement among the bench, the practicing bar and the public at large that much of this strife could be avoided by procedures aimed at aiding conciliation instead of impeding it; reducing hostility and bitterness instead of exacerbating it; and promoting amicability and agreement between the parties upon unresolved issues when dissolution is inevitable. Instead of placing them at odds and encouraging post-marital disputes."

See also observations of Judge Harry Fisher cited in footnote 126, supra.

230. Professor Monrad Paulsen, "The New York Family Court Act" (1963) 12 Buffalo L. Rev. 420, at pp. 420-421.

See also Note, (1957) 47 Ky L.J. 114, at p. 118:

" The atmosphere of a family court is conducive to successful reconciliation. The parties come into court as partners, looking for help, rather than as opponents in court battle. They tell their stories in conference and an investigation is conducted, without benefit of cross-examination and recrimination. The bitterness of a public accusatory trial is avoided, and experts are on hand to guide the proceedings in quiet channels."

And see "The Family in the Courts" (1955-56) 17 Univ. Pitt. L. Rev. 206, at p. 252:

"The findings and conclusions of the group may be summarized as follows:

1. Litigation involving family difficulties presents a social as well as a legal problem. A purely adversary approach to such matters is not in the public interest and may be detrimental to the parties concerned and, in any event, traditionally deals only with symptoms rather than basic causes. A preventive and therapeutic treatment rather than a recriminatory fault-finding technique is socially desirable. The same factors which led to the establishment of juvenile courts persuasively call for similar judicial machinery for the handling of family deterioration.
2. Since treatment rather than punishment should be the social objective, existing judicial machinery is inadequate to cope with family matters and there should be a specialized court to investigate, hear and dispose of such problems.
3. Such a court, whether called a 'family court,' 'domestic relations court,' or referred to by some other name, should be adequately staffed with experts and specialists so that modern knowledge and skill can be applied efficaciously. Suitable

quarters and an appropriate physical plant should be constructed to house the court, its officers, consultants, specialists, and representatives of social agencies treating family problems.

4. Overlapping jurisdictions and fragmentation of family problems occasion confusion, injustice, unnecessary expense, and inefficiency. Such may be readily eliminated by the creation of a family court. Such an integrated court should have the facilities necessary to do a competent job and should achieve rapport with social and sectarian agencies which handle family problems."

- 231. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J. Family L. 505, at pp. 516-517.
- 232. Lindsay G. Arthur, "A Family Court — Why Not?" (1966) 51 Minn. L. Rev. 223, at pp. 226-227.

See also Knudson, Report to the Judges of the Fourth Judicial District Court of Minnesota, January 6, 1959, at p. 37:

"[P]ressures have developed for a family court wherein the symptomatic behavior of members of the family would be handled in one court with an effort made to help the family avoid divorce, family breakdown, delinquency, or other behavior giving society concern, for the very reason that the family was and is the cornerstone of our whole society."

- 233. Judge Paul W. Alexander, "Legal Sciences and the Social Sciences: The Family Court" (1956) 21 Missouri L. Rev. 105 at p. .
See also Judge Paul W. Alexander, "The Family Court — An Obstacle Race?" (1958) 19 Univ. Pitt. L. Rev. 602, at pp. 606-607. The principal postulates defined by Judge Alexander are endorsed and re-iterated in the Standard Family Court Act, 1959 (N.C.C.D.): see comment on section 1.
- 234. Judge Paul W. Alexander, "What is a Family Court Anyway?" (1952) 26 Conn. Bar J. 243, at p. 253-264.
- 235. See observations of Judge Harry Fisher cited in footnote 126, supra. See also text to footnote 241, infra.
- 236. See Professor Meyer Master, Report of Research in Canadian Family Law (Reciprocal Enforcement of Maintenance Orders Act), Canada Council Research Grant S-70-1244.

237. Professor Brigitte M. Bodenheimer, "New Approaches of Psychiatry: Implications for Divorce Reform" (1970) Utah L. Rev. 191, at p. 219
238. Social Aspects Related to the Establishment of a Family Court in the First Circuit Court of Hawaii, First Draft Report of Family Court Committee, A Subcommittee of the Committee to Study Laws Affecting Family Life and Youth, State of Hawaii, Commission on Children and Youth, December, 1963, at p. 11.
239. Ibid., at pp. 1-2.
240. Report of New Jersey Family Court Study Commission, March, 1972, at pp. 2-4.
241. Dean L. Neville Brown, Matrimonial Maintenance in the United States, Symposium on Parental Custody and Matrimonial Maintenance, B.I.I.C.L. Comparative Law Series 13, 1966, at pp. 179-180.
242. University of Birmingham, Institute of Judicial Administration, Family Courts, Comments on a Paper prepared by the Family Courts Working Party of the Law Commission, April, 1972, pp. 3-5, paras. 10-14. See also text to and contents of footnote 29, supra.
243. See, e.g., P.J.E. Cole, "Family Courts -- Their Nature and Function" (1971) 4 Man. L.J. 317; Fred Reagh, "The Need for a Comprehensive Family Court System" (1970) 5 U.B.C. Law Rev. 13; James C. MacDonald, "A Comprehensive Family Court" (1967) 10 Can. Bar J. 323; Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, text to and contents of footnote 34, supra. See also Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, text to and contents of footnote 30, supra; Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, text to and contents of footnote 31, supra; Ontario Family Law Project, Volume X, Family Court and Social Services, 1969; Report of the Royal Commission on the Status of Women in Canada, September 28, 1970, text to and footnote 36, supra.

The concept of unified Family Courts was also endorsed in several submissions or briefs presented to The Special Joint Committee of The Senate and House of Commons on Divorce which held public hearings in Ottawa in 1966 and 1967: see, e.g., Brief of Family Service Association of Edmonton, Alberta, Proceedings of Special Joint Committee on Divorce, November 8, 1966, at pp. 294-296; Brief of United Church of Canada, Proceedings of Special Joint Committee on Divorce, November 22, 1966, at pp. 377-378; Brief of Pastoral Institute of United Church of Canada, Proceedings of Special Joint Committee on Divorce, November 22, 1966, at pp. 423-425; Brief of Judge P.J.T. O'Hearn, Proceedings of Special Joint Committee on Divorce, February 7, 1967, at pp. 664-665; Brief of Ontario Welfare Council, Proceedings of Special Joint Committee on Divorce, March 14, 1967, at pp. 1376-1377; Brief of Daryl E. McLean, Proceedings of Special Joint Committee on Divorce, April 20, 1967, at pp. 1531-1547.

244. Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at pp. 1246-1247.
245. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972.
246. Submission of Trial Division of the Supreme Court of Alberta, Re: Family Court, August 31, 1972, at pp. 2-3 and 11-12. Compare the opinion of Family Court Judge James J. Delaney of Brighton, Colorado, cited in Trial, September - October, 1972, at p. 13:
- "If we view the court only as an impartial arbiter, meting out punishment for a legal transgression, we limit the court's power and influence to 'after the fact' matters and ignore its great potential for prevention and social change."
247. Submission of Trial Division of the Supreme Court of Alberta, Re: Family Court, August 31, 1972, at p. 10.
248. Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Review, 1205, at pp. 1240-1241.
249. U.S. Department of Labor, Children's Bureau Publication No. 193, "The Child, The Family, And The Court," Washington, 1929, at pp. 47-48. And see ibid., at pp. 49-50:

" The primary importance of children's cases has been recognized by the Law itself, which has always been peculiarly interested in them. The necessity of treating juvenile cases adequately is universally recognized by legal thinkers, educators, and social economists. The new judicial technique is well adapted to the handling of juvenile cases, and it has been shown that the juvenile court which is based upon that technique can live up to the expectations of its founders. Entirely apart from the relative importance of adult cases and of juvenile cases, if the new machinery and the new technique are not properly fulfilling their existing functions in children's cases, it can hardly be expected that new functions will be performed better.

If the personnel qualified to administer these delicate questions of family relations is insufficient, either in caliber or in number, to handle adults as well as children, questions of domestic relations involving adults should not be allowed to interfere with the work of the juvenile court. It is far better that

justice be administered properly and thoroughly in one field, particularly when that field is very important, than that new courts try to do too much and as a consequence do nothing well.

Hopes and aspirations should not be allowed to obscure facts. The condition of the juvenile court is a fact, ascertainable in each jurisdiction in which it functions. The greatest service that can be performed today by those interested in the administration of justice in domestic relations is to see that the juvenile court in their community is properly organized and is properly carrying on its functions. For the most part, except in rural communities, the initial effort of founding juvenile courts is past, but there remains to be done the equally important work of making the juvenile court as stabilized and as competent in its field as are most courts of common law. That work should be given right of way.

This is not to say that the juvenile court necessarily must be continued as a separate court, nor that the extension of the new technique to cases of adults is necessarily inadvisable; but every question of change of court organization or of court technique with respect to domestic relations involving the juvenile court should be considered first of all in the light of its probable effect upon the handling of children's cases."

250. Canadian Corrections Association and Canadian Welfare Council, *The Family Court in Canada*, November, 1960, at p. 4. See also text to and contents of footnote 100, supra.
251. Justine Wise Polier, A View From The Bench, 1964 (N.C.C.D.), at pp. 58-60. See also text to and contents of footnotes 39 and 276.
252. Report of The Governor's Commission on the Family, California, 1966, at p. 12. Commenting on these observations, Judge William E. MacFaden, Presiding Judge of the Family Court Departments, Superior Court, Los Angeles County, California, and Meyer Elkin, Supervising Conciliation Counselor of the Conciliation Court of the Superior Court, Los Angeles County, California, have stated:

"This is unrealistic thinking. It is well known among community counseling agency administrators that for every ten positions available, there is only one counselor available. There is nothing to suggest that graduate schools would now rise to the occasion since human needs have been with us for decades and the schools have been able to turn out sufficient numbers of trained personnel to meet the rising needs in our society. To establish a program without the necessary staff would be an impossible situation.

The Los Angeles Conciliation Court, as well other such courts can document the difficulties encountered over the years in recruiting trained staffs. Most recently the Conciliation Court in Los Angeles had openings for two marriage counselors. A widespread recruiting program resulted in twenty-six applications. Of these, only ten people met the job specifications. Of these ten, only four were certified for the list of eligibles. Of these four, only two counselors were able to accept employment. If a Family Court existed in Los Angeles at this time, as contemplated by the proposed Act, there would be chaos, since it has been estimated by the Los Angeles Conciliation Court's administrative and supervisory staff that a staff of more than one-hundred highly trained counselors would be necessary to carry out the Act's provisions": MacFaden and Elkin, "The Case for a Family Court: Progress or Chaos", Conciliation Courts Review, Vol. 6, No. 2, December, 1968, at p. 13.

- 253. Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, November 22, 1966, at p. 361. See also text to and contents of footnote 270 infra.
- 254. See text and contents of footnote 270, infra.
- 255. Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at pp. 1243-1244.
- 256. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J. Family L. 505, at pp. 510-511, citing Sheridan and Brewer, "The Family Court", 4 Children 67 (1957).
- 257. Jack Bradford, Marriage Counselor, Third Judicial Circuit of Detroit, Michigan, "Group Orientation", Conciliation Courts Review, Vol. 8, No. 1, September, 1970, at p. 20. See also Jean Brindley, "Group Intake", ibid, at p. 21; Meyer Elkin, "Group Counseling in a Court Setting", Paper presented at

Sixth Annual Conference of Conciliation Courts; The Conciliation Court, Superior Court of Los Angeles, 1971 Annual Report, at pp. 21-23.

258. See text to and contents of footnote 218.
259. See Stanley N. Cohen, Research Consultant, Conciliation Court of The Superior Court of Los Angeles County, "The Use of Para-professionals by Conciliation Courts", Conciliation Courts Review, Vol. 9, No. 2, December, 1971, at pp. 37-39. See also Bill Carico, Marriage Counselor, Conciliation Court, Redding (Shasta County), California, "Conciliation Court Development of the Para-professional", Conciliation Courts Review, Vol. 10, No. 1, September, 1972, at pp. 25-28.
260. See text to and contents of footnotes 199-203, supra.
261. Thomas Coakley, Judge of Superior Court Mariposa County, California, "Are They Just Statistics? The Need For Family Courts" Address to St. Thomas More Society, San Francisco, January, 1960, at p. 430.
262. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at p. 94. For more extensive discussion of this issue, see text to footnote 276, infra.
263. 387 U.S. 1 (1967).
264. 86 Sup. Ct. 1045 (1966).
265. Ibid., at p. 1054. See also Professor Monrad G. Paulsen, "Kent v United States: The Constitutional Context of Juvenile Cases" (1966) Sup. Ct. Rev. 167, at pp. 186-187, cited in Report of Royal Commission Inquiry Into Civil Rights, Ontario, 1969, Vol. 2, Ch. 40, Juvenile and Family Courts, at pp. 585-586. And see Professor Monrad G. Paulsen, "Juvenile Courts, Family Courts, and the Poor Man" (1966) 54 Calif. L. Rev. 694, at pp. 713-716, and especially p. 716:
- " If we lack the means to perform miracles of human reclamation, should the juvenile court experiment be abandoned rather than merely modified by the introduction of more formal procedure derived from the criminal courts and by becoming somewhat less ready to undertake drastic intervention? In my view, such an abandonment would be quite wrong. An important reason why the juvenile court has survived is the grim prospect of the alternative."
266. Jacob L. Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court" (1963) 12 Buffalo L. Rev. 501, at pp. 503-505.

267. Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at pp. 1208-1212. See also Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J. Family L. 505, at p. 514:

" Juvenile courts are receiving a serious look from scholars and judges today. The therapeutic promises of juvenile court theory are often belied by the realities with which juvenile courts deal. Many courts lack trained probation officers and competent specialized judges. Dispositional alternatives may be limited by serious inadequacies in local community resources. Probation services may be permitted to deteriorate into 'mere watchful supervision or routine reporting' because of heavy probation caseloads. The broad powers given judges to act in the best interests of children are often abused, notably in the areas of prolonged detention of children and lax treatment of procedural rights.

These complaints and criticisms are mentioned here because family courts and juvenile courts are closely related and there are many similarities in the problems they face."

268. Professor Herma Kay, loc. cit., footnote 267, supra, at pp. 1211-1212.
269. U.S. Department of Labor, Children's Bureau Publication No. 193, "The Child, The Family, And The Court," Washington, 1929, at pp. 21-22 and 24.
270. Professor Max Rheinstein, "The Law of Divorce and the Problem of Marriage Stability" (1956) 9 Vanderbilt L. Rev. 633, at pp. 636-640.
271. Unpublished testimony of Judge Robert W. Hansen, Before the New York State Joint Legislative Committee on Matrimonial and Family Law, December 1, 1965.
272. Professor Henry H. Foster, Jr., "Conciliation and Counseling in The Courts in Family Law Cases" (1966) 41 N.Y. Univ. L. Rev. 353, at pp. 379-381.
273. Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at p. 1244.
274. Professor Aidan R. Gough, "A Suggested Family Court System for California (1964) 4 Santa Clara Lawyer 212, at p. 216.

In Canada three months must elapse between the granting of the decree nisi and the issue of the decree absolute, although the court may in special circumstances expedite the issue of the

absolute: see Divorce Act, R.S.C., 1970, ch. D-8, section 13(1) and (2).

- 275. John M. Biggs, "Stability of Marriage - A Family Court?" (1961) 34 Aust. L.J. 343, at pp. 351-352.
- 276. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 89-98.
- 277. Report of the Subcommittee on the Conciliation Court to Matrimonial Actions Committee, Family Law Section, American Bar Association, June, 1961, at pp. 4-5.
- 278. Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at p. 13.
- 279. Professor Henry H. Foster, Jr., "Conciliation and Counseling in the Courts in Family Law Cases" (1966) 41 N.Y. Univ. L. Rev. 353, at p. 379.

See also Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at p. 1247:

"The reader may properly have concluded that the California plan ultimately depends for its success on the possibility of creating a comfortable working relationship among judges, lawyers, the court's professional staff, family members, and the general community, that will permit the court to work with families in a non-adversary and constructive fashion.

The success of the juvenile court depended in part on the same possibility; too often that possibility did not materialize, perhaps because too many hopes were staked on the critical leadership of the judge."

- 280. Judge Paul W. Alexander, "Family Cases Are Different—Why Not Family Courts?" (1954) 3 Kansas L. Rev. 26, at p. 29.
- 281. Canadian Corrections Association and Canadian Welfare Council, The Family Court in Canada, November, 1960, at p. 10. For more detailed submissions and proposals, see observations of Alderman Mrs. E.L. Earl in Appendix D: ibid., at pp. 24-26.

For criticism of the system whereby the provision of resources in the Family Courts may be dependent upon the support of municipalities and counties, see contents of footnote 212, supra. As to the responsibility of the federal government to contribute to the cost of establishing necessary courts and auxiliary services, see text following footnote 223, supra.

282. H. Goldberg and W. Sheridan, "Family Courts--An Urgent Need" (1959) 8 J. Pub. L. 537, at p. 544. As to the need for such a committee to include representation from those members of the public who are personally affected by the judicial process, see text to footnote 101, *supra*.
283. Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, at pp. 134-138, paras. 229-237. For a summary of the basic recommendations, see *ibid.*, at p. 290, paras. 44 and 45:

"44. The function of the 'juvenile court committee' should be clarified. The committee should serve principally as a liaison body between the juvenile court and the community, and also as one form of protection against improper practices in the juvenile court. Its purpose should be to provide continuous public education in the community in order to interpret the purpose and philosophy of the juvenile court, to stimulate the support necessary to enable the court to carry out its objectives, and to have general 'watchdog' supervision of the court and the services upon which the court relies (para. 233).

45. Detailed provisions concerning the juvenile court committee, except as they relate to matters of procedure, should be removed to federal legislation and should be left to provincial legislatures to enact (para. 235)."

See also Canadian Corrections Association and Canadian Welfare Council, The Family Court in Canada, November, 1960, at p. 9:

"Section 27 of the Juvenile Delinquents Act, 1949, states that there shall be in connection with the juvenile court a committee of citizens known as the juvenile court committee. In those provinces where the family court carries out the duties of the juvenile court as defined in the Juvenile Delinquents Act, the family court should, it would appear, have an advisory committee operating with it, at least in connection with cases involving children. As a matter of fact, a great many courts do not have advisory committees and on the whole the experiment with advisory committees has not produced satisfactory results.

There are reasons for this. The role assigned to the advisory committee in the Juvenile Delinquents Act is in some respects administrative. This is exemplified by the provision that a deputy judge cannot hear a case when the advisory committee thinks it should be heard by the judge. Again, the judge's power to appoint voluntary probation officers is limited by the requirement that the committee concur.

This is not the best role for an advisory committee. As far as the direct operation of the court is concerned, the committee should act only in an advisory capacity to the judge on matters of administration. Outside the direct operation of the court there are a number of ways in which the committee can be most helpful. It can help in building up good public relations, and in explaining the work of the court to the community. The members of the committee can be of assistance to the probation staff by finding sources of financial assistance for special cases, helping with locating employment, etc.

The composition of the committee as set out in the Juvenile Delinquents Act is not broad enough. For instance, where there is a children's aid society, the 'committee of such society or a sub-committee thereof' is designated as the court advisory committee. Such a committee would be of little use to a family court in its work with adults. It is far better if the committee is composed of representatives from all community groups that have an interest in the work of the court.

There is no doubt that an advisory committee can be of great assistance to a family court in its work both with adults and children. However, the function and composition of such a committee should be something different from that set out in the Juvenile Delinquents Act."

And see Brief of Ontario Welfare Council, Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, March 14, 1967, at p. 1372.

" The Juvenile Delinquents Act requires that a juvenile court committee be established in connection with a juvenile court. In Ontario, a committee of a children's aid society is required to act in this capacity, but we question to what extent any such committees are functioning in the Province and, in view of the heavy responsibilities carried by the societies, whether they should be expected to do so. In any case, although the duties of the juvenile court committee set out in the federal act relate specifically to juvenile delinquents, in view of the extent to which juvenile and family courts are involved with marital problems and desertions, the function of the juvenile court committee should be reassessed."

284. Donald M. McIntyre, "Conciliation of Disrupted Marriages By or Through the Judiciary" (1964) 4 J. Family L. 117, at p. 126.
285. See Report of the Subcommittee on The Conciliation Court of Los Angeles to the Matrimonial Actions Committee, American Bar Association, June, 1961, at p. 12, para. 11:

"The Judge and counselors should make themselves available to speak before service clubs, civic organizations and professional groups. This, coupled with frequent articles in the metropolitan and local press, and interviews on radio and television, will result in bringing home to the people the public service which is available to it."

See also Final Report of the Committee on Procedure in Matrimonial Causes, England 1947, Cmd. 7024, para. 29 (iii), wherein consideration was given to the possibility of voluntary marriage counselling agencies being assisted by receiving opportunities to broadcast and by enabling information to be given at the offices of Registrars of Marriages. The Committee concluded that "the importance of their work is such that their claim for such facilities should be seriously considered, but there are so many competing claims that the question of priorities must necessarily be left to the judgment of those entrusted with the decision of them."

286. Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, November 15, 1966, at p. 312, para. (e). But see contents of footnote 285 supra.

See also Julien D. Payne, "The Deserted Wives' and Children's Maintenance Act, R.S.O., 1960, Ch. 105: Proposals for Reform" (1969) 8 Univ. West. Ont. L. Rev. 67, at pp. 92-93, citing Report of Canadian Welfare Council on Family Desertion, 1961, at p. 14:

"It would appear that persons encountering difficulties in their familial relationships are frequently unaware of the resources available in the community which may assist them in resolving their financial and other problems and that the deserted family is basically ignorant of its legal rights and its responsibility for instituting legal proceedings for the obtaining or enforcement of a maintenance order. The writer accordingly endorses the recommendations of the Canadian Welfare Council that there should be adequate dissemination of information concerning these matters and that an appropriate agency (e.g. the Department of Public Welfare of the Department of the Attorney-General) should be charged with the responsibility for making the prescribed statutory forms readily available to the deserted spouse or child. The Canadian Welfare Council specifically recommends that a pamphlet outlining the provisions and procedures established by provincial legislation should be prepared and widely distributed. The writer would add the further recommendation that such pamphlet should include information describing the counselling and other services available in the community which may assist persons in the resolution of family conflict."

- 287. See contents of footnote 285, supra.
- 288. Lester E. Olson, Supervising Judge, The Conciliation Court of Los Angeles County, 6th ed., January, 1970, at p. 17, para. 32.
- 289. Professor Henry H. Foster, Jr., "Conciliation and Counseling in the Courts in Family Law Cases" (1966) 41 N.Y. Univ. L. Rev. 353, at pp. 378-379. See also ibid, footnote 124:

"It was recently suggested that the proper approach for a conciliation court system would include: (1) judicial supervision of reconciliation efforts; (2) counseling by trained personnel, not judges; (3) a subsequent visit to the judge by reconciled couples to impress on them the importance

of this step; (4) a simple and direct procedure to invoke the court's services, available before as well as after a divorce action is commenced; (5) no filing fee or charges for counseling; (6) court files and communications to counselors that are confidential; (7) award of attorney's fees; (8) provision of short term counseling only; (9) persuasion, not coercion, of couples to use the service; (10) a limitation on caseloads for the counselors; (11) community publicity and education to create support for the program; (12) an imaginative, rather than bureaucratic, court and staff. ABA Family Law Section, Report of the Subcommittee on the Conciliation Court 6-13 (1961), in Ploscowe & Freed, Cases on Family Law 647-50 (1963)."

As part of the Family Law Project being undertaken by the Law Reform Commission of Canada, His Honour David M. Steinberg is undertaking an attitudinal survey of the Canadian judiciary respecting the feasibility and desirability of establishing unified Family Courts and the types of auxiliary services that should be available in the courts.

290. Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at p. 1244. See also Professor Henry H. Foster, Jr., Loc. cit., footnote 289, supra, at p. 369:

" Michigan, particularly Wayne County, has achieved success in the development of inter-professional cooperation. Since 1960, a continuing dialogue among professionals has added to the community understanding of the importance of programs to meet family disorganization. Educational materials, meetings, and conferences have also been utilized to obtain the confidence and cooperation of attorneys and to further public support."

For further analysis of the active steps that might be taken to promote greater understanding and mutual respect between the lawyer and the professional social worker or counsellor, see Professor Sanford Katz, "The Lawyer and the Caseworker: Some Observations", Social Casework, Vol. XLII, No. 1, January, 1961, at pp. 10-15.

As to the potentialities of lawyer-psychiatrist or lawyer-counsellor cooperation in divorce cases, see Professor Brigitte M. Bodenheimer, "New Approaches of Psychiatry: Implications for Divorce Reform" (1970) Utah L. Rev. 191, at pp. 194-196.

- 291 See loc. cit., footnote 288, supra, at pp. 15-16, para. 28. See also Donald M. McIntyre, "Conciliation of Disrupted Marriages By or Through the Judiciary" (1964) 4 J. Family L. 117, at pp. 126-127:

" The attitude of the bar toward counseling services is an important consideration, since lawyers, especially those handling a substantial number of family cases, are in a position to persuade parties initially inquiring about a divorce or requesting advice on matrimonial problems to seek help from marriage experts. Today, about fifty per cent of the cases coming before the Los Angeles Conciliation Court are at the instance of lawyers. The practicing bar undoubtedly views marriage counseling activities from a different vantagepoint than the courts or the counseling agencies themselves. The initial reaction of many practitioners to a proposed conciliation plan in the court is less than enthusiastic, usually because of skepticism and the fear that the judiciary is encroaching on an activity which lawyers (although ineptly) have attempted to perform. Once it is demonstrated that such feelings are unfounded and, furthermore, that reconciliation will not preclude — but rather insure — the collection of fees, these views change."

292. See H.L. Goldberg and W.H. Sheridan, "Family Courts — An Urgent Need" (1959) 8 J. Pub. L. 537 at p. 549:

"The key to effective use of family courts is good relationships between social workers and attorneys. This means that present problems in relationships between these two professional groups should be explored. The existence of conflicts between social workers and lawyers is traceable to lack of mutual understanding. Their purposes are not contradictory even though sometimes they are so considered. As mutual sharing occurs between these groups on behalf of the individuals and families from whom they work, difficulties will diminish both in number and intensity.

Members of their professional groups working together on committees for the preparation and passage of social legislation and for the productive working of family courts can help immeasurably. A joint committee composed of members of local and state bar associations and local and state chapters of the National Association of Social Workers can aid family courts in interpreting their work to the public."

293. Ibid., at pp. 13-14.

See also William J. Moshofsky, "A Proposal to Improve Court Services to Families and Children in Oregon" (1966) 46 Oregon L. Rev. 77, at pp. 82-83:

"Other Important Findings and Recommendations. The survey was necessarily extended to include community resources and activities related to the court. The following does no more than barely indicate the scope of the matters fully covered in the complete report.

(1) *Law Enforcement.* The NCCD stressed the need for mutual understanding and close co-operation between the police and the courts. Better teamwork between police and court staff can do much to deal effectively with many family-related problems. The NCCD recognized the need for raising budgets to increase police manpower and raise standards.

(2) *Mental Health Clinics.* Such facilities are more important to the juvenile courts than any other community service. They are usually the only resource available for thorough case evaluation, psychological and psychiatric workups, and follow-ups. There are serious unmet needs in this field.

(3) *Schools.* The NCCD strongly recommends as a preventative measure and as a community service to the courts, a program in the elementary schools (particularly the early grades) to provide qualified social workers to help identify and work with the problems of troubled children when the problems are the smallest and least expensive to solve.

(4) *Public Welfare Departments.* The NCCD explored existing relationships and roles of welfare departments and courts, and made many concrete recommendations for improvement.

(5) *Corollary Services.* The NCCD pinpointed the urgent need for treatment methods to fill the gap between training schools for delinquent youth and court probation services in the natural or foster home. Also, the NCCD stressed the need for local family service agencies, group work agencies and diagnostic centers."

And see U.S. Department of Labor, Children's Bureau Publication No. 193, *The Child, The Family, And The Court*, Washington, 1929, at p. 64:

" To supplement the work of the new courts and also to render services in courts organized along the old lines, pending the extension of the new technique, the work of legal-aid bureaus and other social agencies should be strengthened and extended. The staffs of these organizations should have a proper understanding of the functions and methods of the new courts and should maintain close cooperation with them.

A valuable contribution could be made toward the understanding and solution of marital difficulties and other domestic-relations problems if funds were made available for the development in selected communities of domestic-relations clinics, staffed by psychiatrists, psychologists, and social investigators. These clinics should be available to any person desiring help in adjusting troubles growing out of the marital relation."

294. Professor Henry H. Foster, Jr., "Conciliation and Counseling in the Courts in Family Law Cases" (1966) 41 N.Y. Univ. L. Rev. 353, at pp. 377-378.
295. See text supra, CHARACTERISTICS OF IDEAL FAMILY COURT, sub-heading "X. Province-wide or nation-wide system of family courts".
296. See text supra, SCOPE AND OBJECTIVES OF FAMILY LAW. See also State of Hawaii, Commission on Children and Youth, Social Aspects Related to the Establishment of a Family Court in the First Circuit Court of Hawaii, December, 1963, at pp. 8-9:

"Considerable attention was also given to the question of whether, under Jurisdiction, there should be a definition of the term 'family'. While recognition was given to the principle that the services of a Family Court must be keyed to the 'family' and inter-personal relationships within it (including blood, as well as any other household member not related to each other by blood) it was decided that to define 'family' might limit the

jurisdiction of the Court and thus create the problem of exclusion. In effect, the committee's conclusion leaves to the Court the authority to decide what constitutes 'family' if and when the issue arises in the course of a particular proceeding."

297. H.L. Goldberg and W.H. Sheridan, "Family Courts: An Urgent Need" (1959) 8 J. Pub. L. 537, at p. 542.

Compare the more restrictive criteria formulated by Judge Lindsay G. Arthur, "A Family Court — Why Not?" (1966) 51 Minn. L. Rev. 223, at pp. 229-230:

"Family litigation contains three pervasive elements, present in one form or another in every case, which should be handled consistently. The overlap of different courts and their ignorance of each other's treatment of the same problem can only result in more harm than help. Therefore, jurisdiction of the Family Court should include all forms of litigation which contain any of these three elements:

CHILD CARE-Where the court must provide for the care, control, or custody of a child because of parental inability or unwillingness.

FAMILY ESTRANGEMENT-Where the court must provide counselling, control or dissolution of a family by reason of its apathy, lack of communication, or hostility.

FINANCIAL ALLOCATION-Where the court must provide a division of the family's income or property for the adequate support of its various members.

These pervading elements are a distillation of the underlying reasons for families appearing before the courts. Each requires specialized treatment which is consistent from one problem to the next, and which is modified as circumstances change. To the extent that any litigation or jurisdictional channel impinges upon any of these pervading elements, it should be included within the Family Court."

298. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J. Family L. 505, at pp. 525-531.

And see Honorable Gerald R. Corbett and Honorable Samuel P. King, "The Family Court of Hawaii" (1968) 2 Fam. L.Q. 32, at pp. 35-36; Elloeen D. Oughterson, "Family Court Jurisdiction" (1963) 12 Buffalo L. Rev. 467; D. Evavold, "Family Courts in North Dakota" (1968-69) 45 North Dak. L. Rev. 281, at pp. 286-287; Frank H. Myers, "Washington's New Domestic Relations Tribunal" (1956-57) 6 Cath. L. Rev. 139, at p. 141; Judge Lindsay G. Arthur, "A Family Court — Why Not?" (1966) 51 Minn. L. Rev. 223, at pp. 225-226. See also Judge Paul W. Alexander, "The Family Court — An Obstacle Race?" (1958) 19 Univ. Pitt. L. Rev. 602 and footnote 1:

"The principal phases of family law embraced in its jurisdiction are: abandonment (of child, pregnant woman, spouse), abuse of child, adoption, alimony claims, annulment of marriage, assault and battery (intra-familial), bastardy, consent to marry, contributing (to delinquency, dependency or neglect), custody of children, declaratory judgments dependency of children, divorce, filiation proceedings, habeas corpus (intra-familial), husband and wife, juvenile delinquency, neglect of children, non-support (of child, parent, spouse), parent and child, partition of real estate (intra-familial), separate maintenance, visitation of children. (1)"

"1. ...Several, e.g., habeas corpus, partition, declaratory judgments, would hardly be listed in a family court statute."

299. The Governor's Commission stated its priorities as being "revision of the substantive law and the creation of a Family Court". The first priority was achieved in the passage of the Family Law Act (California), 1969; while the second priority was not: see Attorney's Guide To Family Law Practice, 2nd. ed., 1972, Berkeley,

300. Report of the Governor's Commission on the Family, California, 1966, at p. 9. See Richard C. Dinkelspiel and Aidan R. Gough, "The Case for a Family Court—A Summary of the Report of the California Governor's Commission on the Family" (1967) 1 Family L.Q. 70, at pp. 72-73.
301. Report of The Governor's Commission on the Family, supra, at p. 65.
302. Law Commission (England), Paper prepared by Family Courts Working Party, 1971, at pp. 1-2, paras 2 and 3.
303. University of Birmingham, Institute of Judicial Administration, Family Courts, Comments on a Paper prepared by the Family Courts Working Party of the Law Commission, April, 1972, at pp. 5-9, paras. 15-22.

As to the inclusion of matrimonial property disputes within the ambit of jurisdiction of the Family Court, see text to footnote 214, supra.

304. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, at pp. 5-6.
305. Ibid., at pp. 42-43. Compare Brief of Pastoral Institute of United Church of Canada, Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, November 22, 1966, at pp. 423, 431 and 433, wherein the following draft statutory provisions are proposed:

"3. The Court shall have exclusive jurisdiction both civil and criminal in all cases in which parties adverse in interest are or were married to each other and in all cases relating to:

- (1) Restitution of Conjugal Rights
- (2) Separation
- (3) Divorce
- (4) Nullity
- (5) Presumption of Death and Dissolution of Marriage
- (6) Custody
- (7) Adoption
- (8) Affiliation
- (9) Wardship
- (10) Maintenance and Alimony
- (11) Consent to Marriage
- (12) School attendance
- (13) Crimes in which the party injured or one of the parties injured is or was married to the accused or one of the accused

but nothing herein contained shall be deemed to include jurisdiction relating to the administration of estates other than that provided in sections 22 and 31."

"22. (5) The Court may by order provide for the maintenance of the infant by payment by the father or by the mother, or out of an estate to which the infant is entitled, of such sums from time to time as the Court deems reasonable, having regard to the pecuniary circumstances of the father or of the mother, or to the value of the estate to which the infant is entitled."

"26. (1) The Court may, if it thinks fit, on making any decree of restitution of conjugal rights, judicial separation, divorce, nullity, or dissolution of marriage, order a settlement to be made to the satisfaction of the Court of the property of the husband or wife or any part of such property for the benefit of the children of the parties or any of them.

(2) The Court may make such other orders and give such directions as may be necessary or desirable to give effect to any order made under sub-section (1) of this section."

"31. (1) In addition to or instead of making any order under this part of this Act, the Court may, if it thinks fit, on or at any time after any decree of divorce, ...

(b) order a settlement to be made to the satisfaction of the Court of the property of the husband or of the husband's estate, or any part thereof, for the benefit of the wife."

306. Civil Code Revision Office, Committee on Family Court, Working Paper on the Establishment of a Family Court in Quebec, January, 1973, at pp. 13-20.

307. See U.S. Department of Labor, Children's Bureau Publication 193, The Child, The Family, And The Court, Washington, 1929, at p. 60:

"Guardianship may be either of the person or of property. Guardianship of the person of infants, when not created by will or deed, is akin to adoption. Proceedings for the appointment of children's personal guardians and for their removal on the ground of unfitness can best be determined by the juvenile court with its facilities for investigation, although jurisdiction in these cases is generally given to the equity courts.

Guardianship of property involves no considerations that could make the new technique applicable. Property rights of children have always been protected by the common law, supplemented by equity, and there is no reason to disturb the situation. The new courts have enough to do, and generally more than enough, in trying to adjust the more intangible problems of personality."

308. The Family Court of Alberta currently exercises jurisdiction over offences under sections 197 (duty to provide necessities) and 245 (common assault) of the Criminal Code, R.S.C., 1970, c.C-34. In a submission to the Institute of Law Research and Reform, Province of Alberta, R. Curtis has observed:

"Offences under sections 197 and 245 of the Criminal Code are either triable on summary conviction or by way of indictment. The present Family Court Act gives the Family Court jurisdiction over these offences, and presumably the new court will exercise the same jurisdiction. However, presumably the jurisdiction given to the Family Court is only over summary conviction proceedings. Therefore, what happens if the prosecution elects to go by way of indictment? Does this take away the jurisdiction from Family Court? Should it? Should either the Family Court jurisdiction be clarified to be only over summary convictions or the Code amended to make these summary offences only?"

In Ontario, the Juvenile and Family Court has jurisdiction to hear cases arising under sections 168 (corrupting children), 197 (duty to provide necessities), 245 (common assault), 663 (making of probation orders), and 745 (sureties to keep the peace) of the Criminal Code, R.S.C., 1970, c. C-34: see Ontario Family Law Project, Vol. X, Family Courts and Social Services, 1969, at pp. 207-209.

309. As to the jurisdiction of the Juvenile and Family Court of Ontario over juvenile delinquency and the offence of contributing to juvenile delinquency, see Ontario Family Law Project, Vol. X, Family Courts and Social Services, 1969, at pp. 209-211.

310. As to the present jurisdiction of the Juvenile and Family Court of Ontario over neglected children, school attendance, etc., see Ontario Family Law Project, Vol. X, Family Courts and Social Services, 1969, at pp. 202-206, citing Minor's Protection Act, Schools Administration Act, Training Schools Act and Child Welfare Act.
311. See U.S. Department of Labor, Children's Bureau Publication 193, The Child, The Family, And The Court, Washington, 1929, at p. 61:

"It is no longer believed that all feeble-minded persons (to the extent to which society is able to provide for their care) should be segregated in institutions. The question of commitment of a mentally defective child to an institution involves consideration of his home conditions, his own behavior, the special educational facilities available to him, and the possibility of supervision in the community that will safeguard his own interests and those of the public. Obviously the mere determination of the grade of mental defect is not sufficient; the process involves social investigation as well as psychological and psychiatric study. Moreover, feeble-minded children often come before the juvenile court as delinquents or dependents, and the court should have power to select the type of care best adapted to each child's needs. Hence it is desirable to give the juvenile court jurisdiction over these cases, which are comparatively few in number, and over the very few cases of insane children. ...A tendency may be noted also to extend the jurisdiction of the juvenile court to minors who are in need of special care because of physical handicap."

312. See U.S. Department of Labor, Children's Bureau Publication 193, The Child, The Family, And The Court, Washington, 1929, at p. 10:

"To prevent future dependency and to recognize the State's interest in children many statutes provide for pecuniary aid to mothers who can not support their children and whose husbands are dead, have abandoned them, or are not in a position to aid in their children's

support. Such aid, frequently called 'mothers' pensions,' is in some States under the jurisdiction of a court; in others under that of an administrative board."

And at p. 61:

"Chiefly because the movement for granting public aid to dependent children in their own homes (the so-called mothers' pension movement) was in the beginning an outgrowth of the juvenile-court movement, a number of States have placed administration of this aid in the court having juvenile jurisdiction. This function is primarily administrative and not judicial, and logically it should be vested in a properly equipped public department rather than in a court. Here again local conditions may modify this generalization."

313. See Infant Gandubert and Louis Gandubert v. Riverside Hospital, John Andrews, Andrew Fuzi and Nicole Gandubert, Unreported, January 26, 1972 (Ont. S.C.) (Lief, J.), wherein an interim injunction was granted to preclude an abortion sought by the wife and opposed by the husband.
314. H.A. Finlay, "Commonwealth Family Courts: Some Legal and Constitutional Implications" (1970-71) 4 F.L.R. 287, at pp. 307-308.

See P.J.E. Cole, "Family Courts—Their Nature and Function" (1971) 4 Man. L. J. 317, at p. 332:

"The question of inter-spousal assault, has raised for some the spectre of introducing criminal proceedings into the family courts, and indeed in Manitoba the present Chief Judge of the Family Court of Winnipeg has seen fit to remove such charges from his docket and have them transferred to City Magistrate's Court. Similar reservations have been held in regard to juvenile delinquency cases and there may be some foundation for this. Criminal matters do not belong in a court of reconciliation, but nevertheless they can be a very real part of the discord within a family unit, and leaving them outside the court's jurisdiction would defeat the whole purpose of treating the family and its problems as a whole. The answer is probably to have a physical plant large enough to keep such proceedings apart from the non-criminal matters. The California proposal suggests a division

within the court between the Juvenile and Domestic departments, both, however, sharing the same physical location."

See also Report of Royal Commission Inquiry Into Civil Rights, Ontario, 1969, Vol. 2, Ch. 40, Juvenile and Family Courts, at pp. 553-554:

"The wisdom of conferring on all juvenile and family court judges the jurisdiction of magistrates is questionable. By an informal direction from the Attorney General, certain criminal charges against adults are proceeded with in the juvenile courts. These involve charges of failing to provide necessities for children, common assault, and corruption of children. The intention of the directive is that in so far as these offences relate to the family relationship they should come before the juvenile court judges in their capacity as magistrates. It is questionable whether this indirect means of conferring jurisdiction on juvenile court judges to try indictable offences with the election of the accused, or, in the alternative to hold preliminary hearings, is wise."

315. See Judge David H. Jacobs, "The Handling of Domestic Relations Cases in the Connecticut Circuit Court", Proceedings of Section of Family Law, American Bar Association, 1962, at p. 210:

"And although we do not possess jurisdiction over divorces, annulments and legal separations, as was previously pointed out, there is wide range of criminal offenses affecting the family in one way or another which come to the Circuit Court. When a criminal offense comes before the Court, upon representation of the prosecuting attorney that the matter involves a domestic relations involvement as such, the case is normally referred to the Family Relations Division for investigation and report; the case is then continued (with or without bond) to a day certain, to be heard at a family relations session of the Court, and disposed of only after a full investigation and report to the court. What the family relations officer attempts to accomplish is to bring to the attention of the Court the areas of disagreement between the spouses--often recommendations or suggestions are advanced--all directed to ameliorate or dissipate those differences--and, in a word--all attempts are made at this level to save the marriage, if possible, and to avert the road that leads to final dissolution of the marriage. I would be one of the first to concede that there are bad marriages, and like a bad

promise, or better yet, a bad cake, is better broken than kept. With these so-called 'bad marriages' perhaps little can be achieved in our Court."

316. The specific citations for the "American reviews" cited in the text are as follows: U.S. Department of Health, Education and Welfare, Children's Bureau, Standards for Specialized Courts Dealing with Children, 1954, pp. 33-35; and the Standard Juvenile Court Act, N.C.C.D. (6th ed., 1959) s.11 and comment, pp. 28-29.
317. Citing Standards for Specialized Courts Dealing with Children, supra, footnote 316, at pp. 33-34. For subsequent restatement of these conclusions, see U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at pp. 41-42. And see ibid., at pp. 43-45:

"The foregoing discussion of jurisdiction was limited to that recommended for the juvenile court. There appears to be increasing interest throughout the country in the establishment of family courts having jurisdiction over domestic relations issues as well as the traditional juvenile court jurisdiction. Family Courts already exist in several jurisdictions; in others, family court legislation is under study. ... The jurisdiction of the family court should include all of the recommended jurisdiction of the juvenile as well as original and exclusive jurisdiction over the following:

- (1) To try any adult charged with—
 - (a) failing to provide support for any person in violation of law;
 - (b) an offense, other than a felony, against a member of his immediate family".

See also U.S. Department of Health, Education and Welfare, Children's Bureau Publication 472-1969, Legislative Guide for Drafting Family and Juvenile Court Acts, section 10:

"The court shall have exclusive original jurisdiction:

- (a) To try any offense committed against a child by his parent, guardian, or any other minor or adult having his legal or physical custody;

(b) To try any minor or adult charged with:

(1) deserting, abandoning, or failing to provide support for any person in violation of law;

(2) an offense, other than a felony, committed by one spouse against the other.

In any case within subsections (a) or (b) (1) or (b) (2), the court in its discretion may transfer the proceedings to a court which has criminal jurisdiction of the offense charged."

For detailed proposals defining alternative procedures for processing criminal complaints against adults, see ibid., at pp. 54-57: Appendix, infra.

See also Standard Family Court Act, N.C.C.D., 1959, section 11:

"The court shall have exclusive original jurisdiction:

1. To try any offense committed against a child by his parent or guardian or by any other adult having his legal or physical custody.

2. To try any adult charged with:

(a) deserting, abandoning, or failing to provide support for any person in violation of law;

(b) an offense, other than a felony, against a member of his immediate family.

If the defendant in any case within subdivision 1 or 2a or 2b is entitled to trial by jury and shall demand it or shall not waive trial by jury as provided by law, the court may act as an examining magistrate and certify him for criminal proceedings to a court which has trial jurisdiction over the offense charged."

And see Family Court Act, Hawaii, Act 232, S.L.H., 1965, section 333-11:

"Sec. 333-11. Jurisdiction: adults. The court shall have exclusive original jurisdiction:

(a) To try any offense committed against a minor by his parent or guardian or by any other person having his legal or physical custody, including violations of sections 330-6 and 330-10;

(b) To try any adult charged with:

(1) deserting, abandoning, or failing to provide support for any person in violation of law;

(2) an offense, other than a felony, against the person of the defendant's husband or wife.

In any case within subsection (a) or (b) (1) or (b) (2) of this section the court may, in its discretion, waive its jurisdiction and certify the defendant for criminal proceedings to a court which has trial jurisdiction over the offense charged."

See Elizabeth and Richard Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 11-12:

"The Standard Act and Hawaii's Act both permit criminal trials in the family court, but if a jury is claimed, both acts permit the trial to be shifted to an ordinary criminal court. This is intended to 'protect the court against having to give an undue amount of time to criminal cases.' In practice, in Hawaii's First Circuit Family Court, criminal cases are almost always waived to adult criminal courts where the charges cannot be resolved by the intake and counseling service at the pre-trial stage. A referee who has been with the family court since its inception could not recall a single criminal trial ever held in the family court.

Rhode Island's Act gives the family court judge discretion to transfer adult cases arising under the juvenile code to regular criminal courts; if jurisdiction is not waived, juries may be imported into the family court. In practice family court jury trials are seldom held; claiming a jury is said to be primarily a dilatory tactic.

New York's family court, as stated earlier,

has no criminal jurisdiction, and family offense cases must be transferred to criminal court if the family court concludes that its conciliation procedures would be ineffective. Thus the New York Act requires by law that which in practice takes place in the First Circuit Family Court in Hawaii."

As to the dispositional powers of the Family Courts of Hawaii, New York State, and Rhode Island, see ibid, pp. 76-78.

318. See Elloeen Oughterson, "Family Court Jurisdiction" (1963) 12 Buffalo L. Rev. 467; Monrad Paulsen, "The New York Family Court Act" (1963) 12 Buffalo L. Rev. 420.
319. As to the difficulties arising from the statutory failure to specify whether the word "assault" included felonious assaults, see Judge Liston F. Coon, "Felony Assaults in Family Court" (1965) Vol. 1, No. 4, Criminal Law Bulletin, 11 et seq.
320. Compare Family Court Act, Rhode Island General Laws, Title 8, Ch. 10, §8-10-4:

"8-10-4. Criminal cases referred to family court.

To said family court shall also be referred for hearing, adjustment, reconciliation, decision and sentence all causes properly brought in said court or appealed from other courts in which the defendant is accused, as provided by the statutes, of abandonment of his wife or children, or both, leaving them in danger of becoming public charges; of neglect to provide according to his means for his wife or children, or both; of neglect or refusal of an habitual drunkard to aid in the support of his family; of neglect or refusal by a child over twenty-one (21) years of age to provide for the support and maintenance of his father or mother; of threat to commit a crime or offense against the person or property of the defendant's husband, wife, children, father or mother; of threat to commit a crime or offense against the person or property of the defendant's husband, wife, children, father or mother; assault, assault and battery, or assault with a dangerous weapon, or attempt at such assault, upon the defendant's wife or husband or children, or upon a parent by his child."

321. See contents of footnote 317, supra.

322. Report of Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, at pp. 210-216. For a summary of the recommendations, see ibid., pp. 296-297, paras. 89-90.

"89. Federal legislation relating to juvenile and family court jurisdiction over offences committed by adults should be altered so as to permit certain less serious offences committed by adults, and involving family relationships, to be dealt with in the juvenile or family court. The basis for legislative change should be as follows:

- (1) The juvenile or family court should have jurisdiction over certain designated offences committed in circumstances where
 - (a) a child is the victim of an offence and there is a continuing relationship between the child and the adult charged, or
 - (b) the offence has been committed by one member of a family or household against another and a child is substantially affected by the proceedings.
- (2) The juvenile or family court should, so far as practicable, have exclusive original jurisdiction in the situations designated.
- (3) The accused should be entitled to an election as to whether he wishes to be tried by the juvenile or family court or to have the matter transferred to the ordinary criminal courts. The juvenile or family court should also have the power to transfer any case to the ordinary criminal courts.
- (4) The Criminal Code should be reviewed to determine what offences might, in the circumstances suggested, appropriately be dealt with in the juvenile or family court.
- (5) The juvenile or family court should have the power to dispose of appropriate cases by entering an order for the absolute or conditional discharge of an offender (para.373).

90. Study should be given to schemes, already adopted in other jurisdictions, whereby problems of family relationships are kept out of ordinary criminal courts (para. 374)."

323. For detailed analysis, see Report of Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, at pp. 206-210, paras. 361-366:

Contributing to Delinquency

361. Difficult and important questions of policy are presented by the offence of contributing to delinquency under the Juvenile Delinquents Act and its companion Criminal Code offence of corrupting children. Perhaps the most concise statement of some of the basic objections to these offences is to be found in an explanatory note appended to one of the draft sections of American Law Institute's Model Penal Code. The note states, in part, as follows:

'Authorities concerned with the welfare of children have disavowed the loosely drawn statutes against contributing to delinquency. Experience has shown that such statutes are almost always invoked in situations specifically dealt with by other Sections of the Code, especially those concerned with sexual offenses. To the extent of the overlap, there is no need for the contributing statute. More important, the existence of this overlapping catch-all has been.... a means of avoiding legislative judgments, made in other sections dealing with specific offenses, on such matters as mens rea, punishability of consensual intercourse, proper grading of offenses, corroboration of complaining witnesses, and adequacy of proof generally. Finally, the contributing legislation embraces such a vast range of behavior as to make it completely meaningless as a criminologic category, treating as one class, for example, a rapist, a dealer who buys stolen junk from a fifteen-year-old boy, a narcotics peddler who lures high school children into drug addiction, and a parent who keeps his child out of schools where flag saluting is required.

The basic error that appears to account for the prevalence of the legislation here disapproved is the assumption that the comprehensive terms in which jurisdiction is commonly conferred upon juvenile courts over 'delinquent, dependent or neglected' children are also appropriate to define a criminal offense. It is one thing to give broad scope to an authority to promote the welfare of children, but quite another thing to give a criminal court equivalent latitude in defining crimes for which adults shall be punished....'.

362. It was the State of Colorado in 1903 that first introduced an offence of contributing to delinquency into juvenile court law. The Colorado idea was quickly adopted by most American States, and also served as the original model for what is now section 33 of the Canadian Act. Two principal considerations seem to account for the popularity of the contributing provisions. First of all, the offence of contributing to delinquency provided a means for bringing proceedings against adults into the juvenile court. In this way, it became possible to extend the protective atmosphere of a juvenile court hearing, not only to child offenders, but also to children compelled to give evidence in respect of offences committed against them by adults. Secondly, the view has been widely held that criminal sanctions should be employed, as a preventive measure, to protect children against a wide variety of unwholesome environmental influences that might be expected to have harmful consequences for a child's moral development. It was this view that found expression in the offence of contributing to delinquency. Having regard to the apparent difficulty in defining in advance the variety of situations that might call for action on the part of the community, it was thought necessary to define the liability of adults in very broad terms lest the preventive objective of the law be thwarted. This rationale of the contributing provisions gained wide acceptance, both in Canada and the United States - notwithstanding the obvious objection that such provisions fail to meet the standards of definiteness ordinarily required in a criminal state. Illustrative of this attitude are the following observations of a New Mexico court: 'The ways and means by which the venal mind may corrupt and debauch the youth of our land....are so multitudinous that to compel a

complete enumeration in any statute designed for the protection of the young before giving it validity would be to confess the inability of modern society to cope with juvenile delinquency.'

363. Despite the fact that the offence of contributing to delinquency has been part of the criminal law in North America for over half a century, surprisingly little is known about the circumstances in which the contributing provisions are actually invoked. So far as we have been able to discover, the matter has never been the subject of a systematic study anywhere in Canada. One thing that does seem apparent, however, is that offence provisions of this kind can be used for a number of purposes, not all of them related to the welfare of children. By charging an accused with contributing to delinquency in circumstances where he could have been charged with an offence under the Criminal Code, a prosecutor is, in effect, in a position to deprive an accused of the opportunity that he would otherwise have of electing trial by a jury or by a higher judicial tribunal. We have been told, moreover, that a charge of contributing to delinquency is often laid because: (a) it is easier to get a conviction against an adult in the juvenile court than in the ordinary criminal courts; and (b) the juvenile court tends to impose heavier sentences upon conviction. In our view there is a very real danger of prejudice to an accused charged with contributing to delinquency - a danger that arises, in part, from the laxity that characterizes the conduct of proceedings in some juvenile courts, and, perhaps more important, from the tendency for the court's attitude toward an accused adult to be influenced by its protective feeling toward the child. This danger of prejudice is increased in some cases by denying to an accused charged with contributing, defences that would have been available to him had he been charged in respect of the same conduct under the relevant provision of the Criminal Code. For example, it is a defence to a charge under section [146] of the Criminal Code of having sexual intercourse with a female person between the ages of fourteen and sixteen 'that the evidence does not show that, as between the accused and the female person, the accused is more to blame than the

female person.' Similarly, it is a defence to a charge of seduction of a female person between the ages of sixteen and eighteen under section [151] of the Code that the female person was not 'of previously chaste character'. Out of concern for the protection of girls, the courts have held that any such defence is not available to an accused charged with contributing to delinquency. It seems to us that by failing to distinguish between cases where a teenage girl is exploited and cases where the girl is a wanton-particularly where, as frequently happens, the male charged is not much older than the girl - the law runs the risk of losing sight both of conventional mores and of its ultimate purpose. It becomes but an instrument for registering moral disapproval on the part of the community without serving in any way to deter similar conduct in others or to help the girl in question.

364. There is still another source of potential prejudice to an accused charged with contributing to delinquency. This arises from the inherent difficulty of the concept of contributing to delinquency as an offence category. For what, in fact, does contributing to delinquency mean? And what limits should be observed in receiving evidence in support of a charge? Is it desirable, for example, that a court should take into consideration 'the moral character of the accused' or 'the whole atmosphere and conditions under which a juvenile lives', both of which members of the Manitoba Court of Appeal have said are relevant and admissible evidence on a charge of contributing to delinquency? While it is beyond the scope of this Report to trace the development of Canadian case law on the contributing provisions, we should say frankly that in our judgement the courts have yet to articulate a clear test for distinguishing between permissible and prohibited conduct. In many cases, therefore, liability to a criminal sanction will depend almost entirely upon the subjective, and sometime highly speculative, assessment of the judge as to whether particular conduct is or is not such as to contribute to the delinquency of a child. It is true that the statute provides that it is not a defence to a charge of contributing 'that the child is of too tender years to understand or appreciate the nature or effect of the conduct of the accused, or that....the child did not in fact become a juvenile delinquent.' In

interpreting this provision the courts have said that it was 'the evident intention of Parliament....to relieve the Court of the necessity of speculating as to whether or not the child's morals were in fact undermined....'. Nevertheless, the judge is often forced by reason of the indefinite character of the concept of contributing to delinquency to make precisely this kind of assessment. As one judge has observed, the contributing provisions 'place an obligation of self-imposed judicial self-restraint upon the courts.' Cases of failure to exercise this self-restraint are not difficult to find in the reported decisions.

365. From a review of reported cases, there seems to be every reason to believe that in a large percentage of prosecutions under the contributing provisions a charge could have been laid under some appropriate section of the Criminal Code. If it is considered desirable to have such cases heard in the juvenile court it would be quite possible, of course, to confer the necessary jurisdiction upon the juvenile court without establishing a separate classification of offence to accomplish this result. We deal further with the matter of juvenile court jurisdiction over adults later in this Chapter. In so far as the contributing provisions are concerned, it seems to us that the only essential question in issue is this: Is it necessary to have a vague offence category such as contributing to delinquency simply because there is difficulty in defining specifically the kinds of situations to which criminal liability should attach? We think not. It is our recommendation, therefore, that the offence of contributing to delinquency should be abolished. To the extent that this change in the law leaves situations for which penal sanctions are thought to be required, we suggest that Parliament should make provision in the Criminal Code for one or more new offences. Any such offence should be defined with a degree of precision consistent with accepted principles of criminal jurisprudence.

366. Section [168] of the Criminal Code is coextensive in part - although not entirely - with section 33 of the Juvenile Delinquents Act. As we have noted earlier, section [168] provides that anyone is guilty of an indictable offence and liable to imprisonment for two years 'who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in....'. In our view, section [168] is unduly wide in its present form. We are fortified in this conclusion by our reading of the few reported cases in which section [168] has been invoked. Moreover, we think that the maximum penalty provided in section [168] is unnecessarily heavy, having regard to the kind of conduct to which the section is addressed. While the section directs that proceedings shall not be commenced 'without the consent of the Attorney General, unless they are instituted by....a recognized society for the protection of children or by an officer of a juvenile court', we do not regard this as a sufficient guarantee against abuse. We recommend, therefore, that section [168] of the Criminal Code be amended with a view to limiting both its scope and the penalty that can be imposed."

324. Compare U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts at pp. 37-38.

325. See Juvenile Delinquents Act, R.S.C., 1970, c. J-3 section 9:

"Where the act complained of is...an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the Court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of the Criminal Code in that behalf; but such course shall in no case be followed unless the Court is of the opinion that the good of the child and the interest of the Community demand it."

326. Report of Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, Ch.XIV, Summary of Recommendations, pp. 285-287, paras 14 and 16-22. For detailed discussion, see ibid., pp. 77-85.

Compare the provisions of the Standard Family Court Act, N.C.C.D., 1959, sections 9, 10 and 13.

"9. TRANSFER FROM OTHER COURTS

If, during the pendency of a criminal or quasi-criminal charge against a minor in another court, it shall be ascertained that he was less than eighteen years old when he allegedly committed the offense, that court shall forthwith transfer the case to the family court, together with all the papers, documents, and transcripts of any testimony connected with it. If he is under eighteen years of age, the court making the transfer shall order that he be taken forthwith to the place of detention designated by the family court or to that court itself, or shall release him to the custody of his parent or guardian or other person legally responsible for him, to be brought before the court at a time designated by it. The court shall then proceed as provided in this Act.

10. RETENTION OF JURISDICTION

Jurisdiction obtained by the court in the case of a child shall be retained by it, for the purposes of this Act, until he becomes twenty-one years of age, unless terminated prior thereto. If a minor eighteen years of age or more already under family court jurisdiction is convicted of a crime in a criminal court, that conviction shall terminate the jurisdiction of the family court.

13. TRANSFER TO OTHER COURTS

If the petition in the case of a child sixteen years of age or older is based on an act which would be a felony if committed by an adult, and if the court after full investigation and a hearing deems it contrary to the best interest of the child or the public to retain jurisdiction, it may in its discretion certify him to the criminal court having jurisdiction of such felonies committed by adults. No child under sixteen years of

age at the time of commission of the act shall be so certified. ...

When a petition has been filed a child shall not thereafter be subject to a criminal prosecution based on the facts giving rise to the petition, except as provided in this section."

See also U.S. Department of Health, Education and Welfare, Children's Bureau Publication 472-1969, Legislative Guide for Drafting Family and Juvenile Court Acts, sections 8, 9, and 31:

"SECTION 8. TRANSFER FROM OTHER COURTS

(a) If it appears to a court during the pendency of a criminal charge and prior to the entry of a judgment of conviction and order of sentence, that a minor defendant was under the age of 18 years at the time of the alleged offense, the court shall forthwith transfer the case, together with all papers and documents connected therewith, to the family court. All action taken by the court prior to transfer of the case shall be deemed null and void unless the family court transfers under Section 31.

(b) If at the time of the alleged offense the minor charged was under the age of 18 years but this fact is not discovered by the court until after entry of a judgement of conviction and order of sentence, the court may elect to retain jurisdiction and permit the conviction and sentence to stand or dispose of the case as provided for in Section 34, or transfer the case to the family court.

COMMENT

This section, with the exception of subsection (b), is fairly common. Subsection (b) is included in order to discourage deception with respect to age. This will usually involve youth who are in their 17th or 18th year and is intended to prevent delay of adjudication and disposition. It permits flexibility in that the court has three options: sentence the youth as an adult; exercise the powers of the family court and dispose of the case as provided for in this Act; or transfer the case to the family court as provided in subsection (a).

SECTION 9. RETENTION OF JURISDICTION.

For the purposes of this Act, jurisdiction obtained by the court in the case of a child shall be retained by it until he becomes 21 years of age, unless terminated prior thereto. This section does not affect the jurisdiction of other courts over offenses committed by the child after he reaches the age of 18 years.

If a minor already under jurisdiction of the court is convicted in a criminal court of a crime committed after the age of 18, the conviction shall terminate the jurisdiction of the family court.

SECTION 31. TRANSFER TO CRIMINAL COURT.

(a) The [appropriate prosecuting official] may, within 5 days of the date a delinquency petition has been filed and before a hearing on the petition on its merits, and following consultation with probation services, file a motion requesting the court to transfer the child from criminal prosecution if:

(1) the child was 16 or more years of age at the time of the conduct charged, and is alleged to have committed an act which would constitute a felony if committed by an adult; or

(2) the child is 16 or more years of age and is already under commitment to an agency or institution as a delinquent; or

(3) a minor 18 years of age or older is alleged to have committed the delinquent act prior to having become 18 years of age.

(b) Following the filing of the motion of the [appropriate prosecuting official] summonses shall be issued and served in conformity with the provision of Sections 15 and 16. A copy of the motion and a copy of the delinquency petition, if not already served, shall be attached to each summons.

(c) The court shall conduct a hearing on all such motions for the purpose of determining whether there are reasonable prospects of rehabilitating the child prior to his majority.

If the court finds that there are not reasonable prospects for rehabilitating the child prior to his majority and there are no reasonable grounds to believe he is committable to an institution or agency for the mentally retarded or mentally ill, it shall order the case transferred for criminal prosecution.

(d) When there are grounds to believe that the child is committable to an institution or agency for the mentally retarded or mentally ill, the court shall proceed as provided in Section 40(b).

(e) Evidence of the following factors shall be considered in determining whether there are reasonable prospects for rehabilitating a child prior to his majority:

(1) the nature of the present offense and the extent and nature of the child's prior delinquency record;

(2) the nature of past treatment efforts and the nature of the child's response to past treatment efforts; and

(3) the techniques, facilities and personnel available to the court for rehabilitation.

(f) Prior to a hearing on the motion by the [appropriate prosecuting official] a study and report to the court, in writing, relevant to the factors in subsection (e) (1), (2), and (3) shall be made by the probation services or a qualified agency designated by the court.

(g) When a child is transferred for criminal prosecution, the court shall set forth in writing its reasons for finding that there are no reasonable prospects for rehabilitating a child prior to his majority.

(h) Transfer of a child 16 years of age or older for criminal prosecution terminates the jurisdiction of the family court over the child with respect to any subsequent delinquent acts.

(i) A judge who conducts a hearing pursuant to this section shall not, over the objection of the child whose prospects for rehabilitation were at issue, participate in any subsequent proceedings relating to the offense.

COMMENT

This section differs considerably from both the Uniform Act and the Standard Act. It permits waiver of a child 16 years or older who has committed an offense which would be a felony if committed by an adult. It also permits waiver for any offense in the case of a child 16 years of age or older who is under commitment to an agency as a delinquent, or a minor 18 years of age or older who had committed a delinquent act prior to becoming 18 years of age. Where there are reasonable grounds to believe that a child is mentally retarded or mentally ill, waiver is prohibited preceding a finding as to either disability. When a child is found to be committable as a mentally ill or mentally retarded child, no transfer is permitted.

The criterion for waiver is whether there are reasonable prospects for rehabilitating the child prior to his majority. It also spells out the factors to be considered in establishing this criterion. It requires a study of the factors relevant to waiver and a written statement of the findings of the court. These requirements are considered necessary in the light of the Kent case (see Kent v United States, 383 U.S. 541, 565; 1966).

The request for waiver is initiated by motion filed by the appropriate prosecuting official after consultation with probation services. The motion must be filed within 5 days of the date the delinquency petition was filed."

And see Family Court Act, Hawaii, Act 232, S.L.H., 1965, sections 333-9, 333-10 and 333-13:

" Sec. 333-9. Transfer from other courts. If, during the pendency of a criminal charge against a minor in another court, it shall be ascertained that he was less than eighteen years old when he allegedly committed the offense, such other court shall forthwith transfer the case to the family court, together with all the papers, documents, and any available transcripts of testimony connected with it. The court making the transfer shall order that such minor be taken forthwith to the place of detention designated by the family court or to that court itself, or shall release him to the custody of his parent or guardian or other person legally responsible for him, to be brought before the family court at a time designated by it. The family court shall then proceed as provided in this chapter.

Sec. 333-10. Retention of jurisdiction. Jurisdiction obtained by the court in the case of a child may be retained by it, for the purposes of this chapter, until he becomes twenty years of age, unless judicially terminated prior thereto. If a minor eighteen years of age or more already under family court jurisdiction is convicted of a felony in a criminal court, that conviction shall terminate the jurisdiction of the family court.

Sec. 333-13. Waiver of jurisdiction; transfer to other courts.

(a) The court may waive jurisdiction and order a minor held for criminal proceedings after full investigation and hearing when:

(1) a child sixteen years of age or over is alleged to have committed an act which would constitute a felony if committed by an adult, or,

(2) a minor eighteen years of age or over is alleged to have committed an act prior to reaching the age of eighteen which act would be a crime if committed by an adult, or,

(3) a minor eighteen years of age or over already under the jurisdiction of the court is alleged to have committed an act which if committed by an adult would be a crime, and the court finds that there is no evidence the child or minor is committable to an institution for the mentally defective or retarded or the mentally ill, is not treatable in any available institution or facility within the State designed for the care and treatment of children, or that the safety of the community requires that the child or minor continue under restraint for a period extending beyond his minority.

(b) If thereafter any minor with respect to whom the court has waived jurisdiction under this section comes within the provisions of subsection (a) of section 333-8 of this chapter, the court may after a summary review waive jurisdiction and order such minor held for trial under the regular procedures of the court which would have jurisdiction over such offenses if committed by an adult.

(c) If criminal proceedings instituted under the provisions of subsections (a) and (b) of this section result in an acquittal or other discharge of the minor involved, no petition shall thereafter be filed in any family court based on the same facts as were alleged in the criminal proceeding.

(d) A minor shall not be subject to criminal prosecution based on the facts giving rise to a petition filed under the provisions of this chapter except as provided for in this section. ..."

327. See Professor Monrad G. Paulsen, "Juvenile Courts, Family Courts, and the Poor Man" (1966) 54 Calif. L. Rev. 694, at pp. 712-713:

"Some of the poor do not share middle-class values about the regulants of family arrangements. 'Common law' relationships often suffice. Whatever the economic or social position of the practice, a de facto family is much more important than a de jure relationship which no longer is maintained. Should minor assaults within a de facto family be transferred from a criminal court to a family court so that techniques of conciliation can be applied?.... Should middle-class morality stand in the way of extending conciliation attempts to those

who might benefit from the help? Surely state-provided conciliation procedures are appropriate to deal with domestic upheavals where children are involved in a de facto family of some permanence. Unless the community is prepared to remove the children of unmarried parents from the home, some effort should be made to make the environment physically and emotionally safe."

- 328. University of Birmingham, Institute of Judicial Administration, Family Courts, Comments on a Paper prepared by the Family Courts Working Party of the Law Commission, April, 1972, at pp.11-12, para. 33. See also text to footnote 214, supra.
- 329. Conciliation Court of Superior Court, Los Angeles County, California.
- 330. Director, Family Counseling Services, Conciliation Court of Superior Court, Los Angeles County, California.
- 331. Judge William E. MacFaden and Meyer Elkin, "The Case for a Family Court: Progress or Chaos", Conciliation Courts Review, Vol. 6, Pt. 2, at p. 12.
- 332. Assembly Bill 402. See now Calif. Civil Code, § 4101.
- 333. "Although C.C. § 4101 (d) is permissive legislation, the Los Angeles Superior Court is starting with the proposition that all couples need the counseling.": The Conciliation Court, Superior Court, County of Los Angeles, 1970 Annual Report, at p. 11.
- 334. As to the practice in the Conciliation Court of Los Angeles, see 1970 Annual Report, footnote 333, supra, at p. 3:

"The Conciliation Court has developed procedures and policies regarding implementation of this Act and at this point has enlisted the support of 48 community counseling agencies in 90 separate locations for purposes of providing the premarital counseling. The Court is also engaged in ongoing research projects studying the entire problem of teen-age marriages.

Even after the passage of CC § 4101 (d), the Conciliation Court continued to provide counseling interviews for these young people, as well as their parents, if the judge responsible for signing consent to the marriage had some doubts about granting consent and needed a recommendation from the court's counselor.

On a highly selective basis, the Court Commissioners continue to refer to the Conciliation Court parties involved in a paternity suit when it appears that the parties may be contemplating marriage, but are unable to marry because of the interference of outside people, including parents."

For more detailed comment on Calif. Civil Code, § 4101 (d), see Meyer Elkin, "Family Law Reform: California's Constructive Break With Legal Tradition" (1971) 9 Conciliation Courts Review, at pp. 9 and 15-17.

335. Annual Report, 1971, Conciliation Court, Maricopa County, Arizona, at pp. 1 and 7.
336. State of Hawaii, Commission on Children and Youth, Report No. 29, A Study of Law Affecting Family Life and Youth, November, 1964, at p. 18. See ibid., at p. 13:

"RECOMMENDATIONS TO EXISTING AGENCIES, CHURCHES,
MEDICAL PROFESSION OTHER ORGANIZATIONS;

TO DEPARTMENT OF EDUCATION;

TO THE MENTAL HEALTH ASSOCIATION;

TO THE DEPARTMENT OF HEALTH

Subject: Pre-Marital Counseling

#19 Recommendation: Responsibility for pre-marital counseling is not a legislative matter and should be a subject of concern to the individual and parents. It is recommended that:

- 1) Existing agencies, churches, medical profession and organizations should be encouraged to emphasize and further extend their pre-marital and family life programs;*
- 2) The Department of Education should continue to develop and expand the family life course and other related courses in the high schools;*
- 3) The Mental Health Association be asked to prepare a brochure of available resources for pre-marital counseling which could be made available to couples when they apply for a marriage license, or this information be added to the existing flyer printed by the Department of Health entitled, 'Getting Married? Facts about a license'.*

Justification: The Marriage Laws Committee's position on pre-marital counseling is based on the following:

- 1) *The objectives, nature and demands of the counseling process would be hampered if counseling was compulsory.*
- 2) *There are many existing services for pre-marital counseling which are presently not being utilized.*
- 3) *There are a number of possibilities for improving and widening this function. The consensus was that if the State did require registration for pre-marital counseling, it would also be necessary to provide adequately trained staff and means for enforcing requirements.*
- 4) *There is no consensus as to the type of training a marriage counselor should have."*

337. See text supra, THE IDEAL FAMILY COURT, sub-heading VI. Adequacy of support staff. See also text supra, CRITICISMS AND LIMITATIONS OF UNIFIED FAMILY COURTS.
338. Donald M. McIntyre, Jr., "Conciliation of Disrupted Marriages By or Through the Judiciary" (1964) 4 J. Family L. 117, at pp. 117-119. See also Rhonda Goodkin Lorinczi, Marriage Counseling and Conciliation: Known Court - Connected Services With Summaries of Statutes and A Bibliography, American Bar Foundation, 1970.
339. Draft Family Relations Act and Rules of Practice Thereunder Prepared for Discussion by the Rules Committee, Provincial Court (Family Division), Province of Ontario, 1972, Draft Rule 9.
340. P.R.H. Webb, "The Domestic Relations Act 1968 - The First Two Main Objectives" (1969) N.Z.L.J. 700, at p. 701. See generally Domestic Relations Act (New Zealand), 1968, sections 13-18, discussed *ibid.*, at pp. 701-702. For relevant statutory provisions regulating proceedings in the Supreme Court, see Matrimonial Proceedings Act (New Zealand), 1963, sections 4-5. See J.D. Payne, "Statutory Reconciliation Provisions in Australia and New Zealand" (1968) 11 Can. Bar J. 226.

341. See text supra.
342. Judge William E. MacFaden and Meyer Elkin, "The Case for a Family Court: Progress or Chaos", Conciliation Courts Review, Vol. 6, No. 2 (December, 1968) 1, at p. 13.
343. Paul W. Alexander, "The Family Court - An Obstacle Race?" (1958) 19 Univ. Pitt. L. Rev. 602, at p. 606.
344. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, at pp. 68-88 and pp. 95-96. For detailed recommendations respecting support services in the Family Court see *ibid* at pp. 89-95.

See also Brief of Board of Directors and Staff of the Family Service Association of Edmonton, Recommendations for Changes in Alberta Family Court Structure, May 25, 1965, at pp. 8-9:

"SUGGESTED FRAMEWORK FOR A UNIFIED FAMILY COURT"

Policies of the court would be set by "specialist" judges chosen carefully for their capacities of understanding and patience, as well as their legal talent and experience in the field of family welfare.

The approach would differ from regular court procedures in that every attempt would be made at a pre-court level to find out the basic causes of trouble no matter what specific incident lands parent or child in the arms of the law.

Key to this objective would be an intake centre . . . a screening or diagnostic department. Here, skilled social workers would have exploratory talks with the parties to a family dispute or the individual initially brought to court attention.

Housed within the court building (ideally) would be auxiliary social services to be used as indicated in the preliminary talks . . . these would include facilities for psychological testing and psychiatric treatment, an alcoholism clinic, marriage counselling, child therapy workers for children showing anti-social behaviour because of the conflict of their parents.

In addition to any immediate help, this investigation would add to as complete a picture as possible if the problem persists to formal court level. Decisions of the court could then be based on thorough investigation and recognition of the needs of the total family involved.

Probation officers would work before, as well as after, official court sentencing . . . with prevention and treatment the principal considerations.

Representatives of private family and religious agencies would be in direct liaison with the unified court to continue and follow through with the family in the community setting."

- 345. Ontario Family Law Project, Vol. X, Family Court and Social Services, 1969, at pp. 248-259.
- 346. Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, at pp. 7-25.
- 347. Civil Code Revision Office, Working Paper on The Establishment of a Family Court in Quebec, January, 1973, at pp. 48-55. See also *ibid*, pp. 57-58, paras. 51 and 53:

"RECOMMENDATION # 51:

THE COMMITTEE RECOMMENDS THAT THE SPECIALISTS' REPORTS (SOCIAL INVESTIGATOR, MARRIAGE COUNSELLOR, PSYCHIATRIST OR OTHERS) BE TRANSMITTED, WITHIN A REASONABLE TIME, BEFORE HEARING, TO THE PARTIES, ATTORNEYS AND, AT THE DISCRETION OF THE COURT, TO THE PARTIES THEMSELVES, THAT THE AUTHOR OF THE REPORT MIGHT BE CROSS-EXAMINED BY THE PARTIES OR THEIR ATTORNEYS AND THAT, IN CASES OF JUVENILE DELINQUENCY, THE SOCIAL INVESTIGATION REPORTS BE TRANSMITTED TO THE JUDGE ONLY ONCE THE JUDGMENT HAS BEEN RENDERED ON THE CHARGE.

RECOMMENDATION # 53:

THE COMMITTEE RECOMMENDS THAT THE DECLARATIONS MADE AND THE DOCUMENTS PRODUCED BY THE PARTIES WHEN INTERVIEWED BY THE INTAKE SERVICE OR DURING EVALUATION AND CONCILIATION INTERVIEWS, BE CONFIDENTIAL AND INADMISSIBLE AS EVIDENCE WITHOUT THE CONSENT OF THE PARTIES CONCERNED, IN ANY TRIAL."

- 348. Ibid, at pp. 46-48.
- 349. Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at pp. 19-20 and 24.
- 350. Minutes of the Meeting of Canadian Law Reform Bodies to discuss Family Law, Edmonton, June 26-27, 1972, at pp. 95-96.

351. Commission on Children and Youth, State of Hawaii, Report No. 28, A Proposal for the Establishment of a Family Court in the First Circuit of Hawaii, July, 1964, at p. 1, and pp. 10-12. For legislative implementation of the concept of a unified Family Court, see Family Court Act, Hawaii, Act 232, S.L.H., 1965.
352. University of Birmingham, Institute of Judicial Administration, Family Courts, Comment on a Paper prepared by the Family Courts Working Party of the Law Commission, April, 1972, at pp. 10-11, paras. 29-31.
353. See text supra.
354. See William J. Moshofsky, "A Proposal to Improve Court Services to Families and Children in Oregon" (1966) 46 Oregon L. Rev. 77, at pp. 84-85.

"Court Services to Assist the Judge. The second fundamental recommendation of the National Council on Crime and Delinquency is more and better court services. Here is the description of "court services" in the Oregon Council's legislative proposal:

"Court services" includes but is not limited to services and facilities relating to intake screening, juvenile detention, shelter care, study and recommendations on disposition of cases, probation on matters within the jurisdiction of the court under section 3 of this Act, family counseling, conciliation in domestic relations, group homes and psychological or psychiatric or medical consultation provided at the request of or under the direction of the court, whether performed by employees of the court, by other government agencies or by contract or other arrangement.

Most of these services are similar to those now required in juvenile courts. The Council does not recommend that every court actually employ its own staff to provide all of these services. It may be less costly and more productive and efficient for the court to contract for some services.

For example, if a fully staffed mental health clinic exists in a community it would probably be more appropriate for the court to utilize this service for diagnostic and treatment purposes for selected cases than to create within the court itself a like service.

Similarly, where foster care is needed and the public welfare department is able to provide adequate service, there would be no need for the court to duplicate it.

The proposal gives the circuit court full responsibility and authority for hiring, supervising, and discharging staff within the limits of local merit system regulations, but the courts will have advice and assistance from skilled state staff in planning, training, and setting of standards.

There are no statutory or procedural changes included in the proposal. Undoubtedly, each court will make administrative and procedural changes within the present statutory framework. With experience under the proposed system, statutory changes in procedural and substantive matters may be needed."

- 355. See text to footnote 344, supra, sub-heading "B. Administrative Services".
- 356. See text to footnote 345, supra, sub-headings "4. Records and Data Processing" and "5. Administration and Accounts Department".
- 357. For valuable comments on intake procedures in Family and Juvenile Courts, see John A. Wallace and Marion M. Brennan, "Intake And The Family Court" (1963) 12 Buffalo L. Rev. 442; William H. Sheridan, "Juvenile Court Intake" (1962) 2 J. Family L. 139.
- 358. Judge H.A. Allard, Family Courts in Canada, in Mendes da Costa, Studies in Canadian Family Law, Ch. 1, at pp. 17-18.
- 359. Waalkes, Wallace, "Juvenile Court Intake - A Unique and Valuable Tool", Crime and Delinquency, 1964, Vol. 10, No. 2, pp. 117-125 (April), cited in U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at p. 53.
- 360. See Standards for Juvenile and Family Courts, footnote 19, supra, at p. 54. For a detailed analysis of the differing intake procedures in the Family Courts of Hawaii, New York and Rhode Island, see Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 3-11.
- 361. See text to footnote 346, supra.
- 362. See text to footnote 349, supra.
- 363. See text to footnote 347, supra, Recommendation 37.

364. Report of New Jersey Family Court Study Commission, March 27, 1972, at pp. 8-9, paras. 7-8.
365. See also U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at p. 58:

"There is a place for the use of non-judicial processing or informal adjustment in disposing of complaints during the intake process. However, informal adjustment generally should be limited to the following:

1. Referral of the child or the family to a social agency offering services which may be of help. Such a referral should not be compulsory or cause the child or family to feel obligated. Rather, it should be considered as advice as to where help is available in the community.
2. A conference between the complainant and the child or his family or, in the case of nonsupport, between the parents. The purpose of such a conference should be to make adjustments that will obviate the filing of a petition. Attendance at such a conference cannot be enforced, nor can conditions be imposed on the child or his family as a result of it. It should be offered simply as a service which may help to adjust matters without the necessity of formal action by the court. When the matter warrants the filing of a petition, the intake worker may, however, authorize such filing if the child and his family ignore the call to the conference or if the conference discloses that there is need for the child to be brought before the court..

No action which would deny or abridge the rights of a child or parent should be undertaken unless a petition is filed and a hearing held.."

366. Ibid, at p. 55:

"The intake process should be expeditious and not designed for study in depth or continuing treatment. However, every opportunity should be taken to make it a helping process. It should not become a perfunctory action."

367. See text to footnote 347, supra.

368. Proceedings of Section of Family Law (American Bar Association), 1965, at p. 21.

See also Professor Monrad G. Paulsen, "The New York Family Court Act" (1963) 12 Buffalo L. Rev. 420, at pp. 439-440:

"The Domestic Relations Court Act had no effective intake service to screen those cases which, while technically falling within the court's power, involved matters not serious enough for judicial attention. The new Act provides for a preliminary procedure to be implemented by rules of court. For example, in delinquency or person in need of supervision proceedings, rules of court may authorize the probation service to confer with the petitioner, the respondent and others regarding whether filing a petition is advisable and to attempt informal adjustment in suitable cases before a petition is filed; conference and adjustment is authorized only in respect to cases 'over which the court apparently would have jurisdiction.' Similar preliminary conference and adjustment efforts are authorized for neglect, support, and family offences proceedings.

The powers of the probation service in carrying out this intake function are, however, limited. The petitioner may insist upon filing a petition, and the probation service may not prevent it. Further, the adjustment may not extend for a period of more than two months without permission of a judge who may prolong the period for an additional sixty days. Finally, the probation service is given no power to compel the attendance of any person or the production of any papers.

Fundamentally, the pattern is one which leaves to the petitioners the decision whether to press forward to court adjudication. It is interesting to note for comparison the fact that in criminal cases, private persons may not force a prosecution. This decision is left to the prosecutor."

And see Louis Lauer, "New Directions for Court Treatment of Youth" (1963) 12 Buffalo L. Rev. 452, at pp. 460-461.

See also Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 10-11:

"A practicing lawyer in New York City casts doubts on the adjustments value of intake services in support cases, especially if the client needs immediate financial help:

'In cases in which I have appeared, where there has been counsel on both sides, I have not found that intake has served a particular [sic] useful function except to dealy the initiation of the hearing or proceedings, in some cases for inordinate periods of time.'

Advising lawyers to bypass intake and to file formal petitions at once, this attorney notes that clients may be faced with serious interim support problems if they have to wait for intake client conferences, usually scheduled two or three weeks apart. If, on the other hand, a petition is filed at the outset, temporary orders of support may issue even if several hearings are ultimately required. The only real value in going through intake procedures, he feels, stems from the intake staff's willingness to help enforce support orders once an order is issued, if it has been in on a case from the beginning. Otherwise 'this burden will devolved on counsel'."

369. See text to footnote 347, supra.

370. See text to footnote 372, infra. See also U.S. Department of Health, Education and Welfare, Children's Bureau Publication 472-1969, Legislative Guide for Drafting Family and Juvenile Court Acts, section 13 and comment, at pp. 14-15:

" 13. Petition—Preliminary Inquiry—
Authorization to File.

(a) Complaints alleging delinquency, neglect or in need of supervision shall be referred to the intake office of probation services. The intake office shall conduct a preliminary inquiry to determine whether the best interests of the child or of the public require that a petition be filed. If judicial action appears necessary, the intake office may recommend the filing of a petition, provided, however, that all petitions shall be prepared and countersigned by the ()* before they are filed with the court. Decisions of the ()* on whether to file a petition shall be final.

(b) If the intake office refuses to authorize a petition, the complainant in such situations shall be notified by the intake office of his right to review of his complaint by the ()*. The ()*, upon request of the complainant shall review the facts presented by the complainant and after consultation with the intake office shall authorize, countersign, and file the petition with the court when he believes such action is necessary to protect the community or interests of the child.

(c) When a child is in detention or shelter care and the filing of a petition is not approved by the ()*, the child shall be immediately released.

(d) The intake office of probation services shall have the authority to refer the case to an appropriate public or private agency or to conduct conferences for the purposes of affecting adjustments or agreements which will obviate the necessity for filing a petition. During such inquiries, a party may not be compelled to appear at any conference, to produce any papers, or to visit any place. Such inquiries and conferences shall not extend for a period beyond 30 days from the date the complaint was made.

(e) On motion by or in behalf of a child, a petition alleging delinquency or need of supervision shall be dismissed with prejudice if it was not filed within 10 days from the date the complaint was referred to the intake office of probation services.

*Insert title of appropriate prosecuting official.

COMMENT

This section differs significantly from both the Uniform Juvenile Court Act and the Standard Act. It requires that a preliminary inquiry be made by the probation services in delinquency, neglect, or need of supervision cases. It also requires that all petitions be countersigned and filed by the appropriate prosecuting official in the jurisdiction. This is necessary for several reasons. First, he is the person with the expertise concerning the legal sufficiency of the petition. Secondly, under Section 14, he is also the person responsible for conducting the proceeding and for representing the State. It is not the intention, however, to limit the prosecuting official's review to the legal sufficiency of the

complaint. He should also be concerned with the need to protect the child and the community. Studies have shown that the highly therapeutic approach of some intake personnel has resulted in the filing of petitions merely on the basis that the child needed service—service which could be provided by community agencies without court intervention. On the other hand, studies have also shown that petitions have been denied in cases of serious offenses where there was reason to believe that court action was necessary to protect the community.

The role of the prosecuting official, as provided in this section, is also necessary since it relieves the judge of the prosecutorial function, which conflicts with his role as an impartial arbitrator. In the absence of a prosecutor to conduct the case, the probation officer is often cast in his role, which conflicts with his role in assisting the court to arrive at a disposition which is in the interest of the child.

The section also provides for a check on the probation services in that the complainant can appeal to the prosecuting official for a review of intake's decision when authorization of a petition is denied. The appropriate prosecuting official may, after a review of the case, prepare the petition, countersign, and file it with the court when he believes such action is necessary to protect the community or the interests of the child.

This Act does not include a section on informal disposition in terms of a continuing service. This section does permit disposition at the point of intake after conferences, or referral to other community agencies. It also provides that if a petition is not filed within 10 days after the receipt of the complaint by the intake services, the petition is subject to dismissal with prejudice. This is included in order to expedite the intake process as well as to discourage the use of so-called unofficial probation and other services of a continuing nature without properly invoking the jurisdiction of the court. Such services can be provided, however, without a finding by a consent decree pursuant to Section 33.

As to the impact of intake procedures in the New York, see Justine Wise Polier, A View From The Bench, N.C.C.D., 1964, at pp. 8-10:

"For reasons that are not clear and require careful study, the new probation service at intake has been far more effective in cases where the child is alleged to be delinquent or in need of supervision than where a charge of neglect is lodged against parents. ...The achievement at intake in adjusting cases of children alleged to be delinquent or in need of supervision has already improved the whole picture in regard to the detention of children pending disposition. Among other contributing factors are the sharp drop in the number of delinquent children brought before the court on new petitions, the definite restriction under the new law on the length of time the court may remand such children pending disposition, and the expansion of state facilities for children needing placement. ...Explanations for the comparatively limited success in adjusting neglect cases at intake, through either probation or referral to community agencies on a voluntary basis, are needed as a condition to sound planning for temporary and long-term placement facilities for neglected children and for community services.

While the volume of work at the initial hearing has been substantially reduced through the new probation services at intake, the volume of work at the dispositional hearing (following investigation) continues to be heavy."

371. See text to footnote 364, supra and footnote 372, infra. See also Chief Judge H.T.G. Andrews, text to footnote 346, supra, sub-heading "Intake Counselling". And see U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at p. 55:

"The importance of the function and the nature of the determinations in the intake process require the assignment of probation officers having considerable experience and special skills. The intake worker should be particularly skillful in short contact interviewing. He must be thoroughly familiar with court policies and procedures and the statutes under which the court operates. He should also be familiar with the functions and intake procedures of the agencies in the community which provide service and care for children."

372. John A. Wallace and Marion Brennan, "Intake And The Family Court" (1963) 12 Buffalo L. Rev. 442, at pp. 448-450.
373. See text to footnote 344, supra, sub-heading "2. Investigation".
374. See text to footnote 347, supra.
375. See text supra, at pp. 314-319.
376. Robert J. Levy, Uniform Marriage and Divorce Legislation: A Preliminary Analysis, National Conference of Commissioners on Uniform State Laws, at pp. 31-36.
377. For definition of "counsellors", see James H. Graves, M.D., "Marriage Counseling: A Psychiatric Viewpoint" (1963) 42 Michigan State Bar J. 21:

"There are, in reality, three primary professional groups who involve themselves in therapeutic activities with adults in marital conflict. These are social case workers, clinical psychologists and psychiatrists. It is not surprising that clients or their attorneys can't clearly differentiate who does what, as there has arisen, on occasion, even among these primary mental health disciplines, inter-group strife about who should properly perform certain functions."

378. John M. Biggs, "Stability of Marriage--A Family Court" (1961) 34 Aust. L. J. 343, at p. 350. See also James C. MacDonald, "A Comprehensive Family Court" (1967) 10 Can B. J. 323, at p. 333.
379. Meyer Elkin, "Family Law Reform: California's Constructive Break with Legal Tradition" (1971) Conciliation Courts Review, Vol. 9, Pt. 1, at p. 13. See also Judge Lester E. Olson, The Conciliation Court of Los Angeles County, 6th ed., 1970, at p. 8. And see Judge Laurens L. Henderson, Supervising Judge of Maricopa County Conciliation Court, Arizona, "Marriage Counseling in a Court of Conciliation" (1969) 52 Judicature 253, at p. 256:

"Even in instances where the parties are not reconciled after counseling, we believe considerable benefits both to parents and to their children are derived as a result of counseling. It is felt the parents are better conditioned for their post-divorce situation and their attitudes toward each other and toward the children often are greatly improved. Attorneys have reported to us that the counseling

frequently has resulted in reduced tensions and hostilities to the point where satisfactory settlements of support payments, custody, visitation, and other problems have been accomplished prior to the final divorce hearing, and which results otherwise would not have occurred without a bitter court contest. . . Lawyers now constitute our largest referral source. In 1967 lawyers referred 56 per cent of our cases. Many skeptical lawyers have turned out to be the court's best boosters."

The above opinions do not imply, however, that the counsellor should assume the role of the lawyer and attempt to devise an appropriate settlement. Thus, commenting upon a proposal of the Governor's Commission on the Family, California, 1966, Judge William E. MacFaden and Meyer Elkin ["The Case for a Family Court: Progress or Chaos" (1968) Conciliation Courts Review, Vol. 6, Pt. 2, at p. 12] have stated:

"Section 019 [of the draft bill] reads

'If the parties conclude that reconciliation is not feasible, they then enter into further consultation with the court's professional staff, with an eye to working out settlement of the problems of child custody, and visitation, division of marital property and future support.'

This is a most distressing provision since the language sounds like it was taken out of the Sitton-Winterfield Initiative, an initiative which had as its goal to take all matter pertaining to divorce out of the hands of the courts. This statement thrusts the counselor into the area of adjudication which is not his role. The counselor does not have the training or experience to adjudicate such matters. The functions of adjudication and counseling should be sharply differentiated."

See also text to footnote 393, infra.

380. Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at p. 1228. See also P.J.E. Cole, "Family Courts — Their Nature and Function" (1971) 4 Man. L. J. 317, at p. 336, citing Kay, op. cit., p. 1248:

" 'The court's objective when it is petitioned to inquire into the continuance of a marriage, must be to discover the facts; when the facts lead to the conclusion that the marriage should be dissolved, the court must be prepared to act accordingly. Only in this way will the court's professional staff be free to work honestly with each other, rather than feeling compelled to produce statistical 'reconciliations' to justify the court's existence.'

The emphasis on therapy is no longer to be placed at the intake stage (unless the parties wish such counselling) but on the settlement of the dissolution (where a divorce is desired). In other words, 'divorce' counselling rather than 'marriage' counselling, in an effort to make the separation as amicable as possible, and to prepare the parties for their new status, because divorce is a beginning as well as an end. If such counselling can help the parties to gain insight into the reasons for the failure of their marriage, then perhaps the same mistakes will not be repeated in any remarriage. Thus, paradoxically, 'divorce' counselling may turn out to be more fruitful of the therapeutic ideal than 'marriage' counselling because it is given before a possible marriage and not just prior to its termination."

See also Aaron L. Rutledge, "Marriage Counseling: An Overview" (1963) 42 Michigan State Bar J. 27:

"Many marriages cannot be saved, regardless of the skill of the counselor. Not everyone is capable of maintaining a marriage relationship and much heartache on their part, as well as stress on the part of the counselor, would be avoided if this could be admitted. It may be that one of the couple has become too sick or recalcitrant to be tolerated further; so that one has grown up to such an extent that the juvenile antics of the once-loved mate makes him sick. It can be that two essentially healthy, but vastly different personalities, together create

a relationship that is too taxing upon the individuality of one or both, and maybe upon the children also.

In most cases this man and this woman together possess as much potential for a working marriage as either of them would find with another mate of their choosing. But, if any of the above hopeless conditions apply, what if they do divorce? Does this invalidate the marriage counseling they have experienced? Not if it has enabled them to make a painful decision in a rational, rather than a reactive manner; not if they part as cooperative adults rather than as fighting enemies; not if planning for the welfare of the children, under the circumstances of a terminated marriage, can be a central goal rather than using them as pawns in a lifelong rite of vengeance; and not, if from the hurtful experience they are enabled to understand themselves, along with their responsibility in the failure, and turn this into education for a possible future marriage. After all, personality, not marriage, is the supreme human value."

381. See text to footnote 277, supra.
382. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 38-39.
383. Sections 7 and 8 of the Divorce Act, R.S.C., 1970, ch. D-8 provide as follows:

"7.(1) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a petitioner or a respondent on a petition for divorce under this Act, except where the circumstances of the case are of such a nature that it would clearly not be appropriate to do so,

(a) to draw to the attention of his client those provisions of this Act that have as their object the effecting where possible of the reconciliation of the parties to a marriage;

(b) to inform his client of the marriage counselling or guidance facilities

known to him that might endeavour to assist the client and his or her spouse with a view to their possible reconciliation; and

(c) to discuss with his client the possibility of the client's reconciliation with his or her spouse.

(2) Every petition for divorce that is presented to a court by a barrister, solicitor, lawyer or advocate on behalf of a petitioner shall have endorsed thereon a statement by such barrister, solicitor, lawyer or advocate certifying that he has complied with the requirements of this section.

8. (1) On a petition for divorce it is the duty of the court, before proceeding to the hearing of the evidence, to direct such inquiries to the petitioner and, where the respondent is present, to the respondent as the court deems necessary in order to ascertain whether a possibility exists of their reconciliation, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, and if at that or any later stage in the proceedings it appears to the court from the nature of the case, the evidence or the attitude of the parties or either of them that there is a possibility of such a reconciliation, the court shall

(a) adjourn the proceedings to afford the parties an opportunity of becoming reconciled, and

(b) with the consent of the parties or in the discretion of the court, nominate

(i) a person with experience or training in marriage counselling or guidance, or

(ii) in special circumstances, some other suitable person,

to endeavour to assist the parties with a view to their possible reconciliation.

(2) Where fourteen days have elapsed from the date of any adjournment under subsection (1) and either of the parties applies to the court to have the proceedings resumed, the court shall resume the proceedings."

- 384. Report of the Divorce Counselling Unit , Department of National Health and Welfare to the Law Reform Commission of Canada, October, 1972, at pp. 6-9.
- 385. E.J. Griew, "Marital Reconciliation--Contexts and Meanings" (1972) 30 Camb. L.J. 294, at pp. 307-314.
- 386. Jon M.A. McLaughlin, "Court-Connected Marriage Counseling and Divorce — The New York Experience" (1972) 11 J. Family L. 517, at pp. 530-532.
- 387. Ibid., at p. 545.
- 388. Donald M. McIntyre, Jr., "Conciliation of Disrupted Marriages By or Through the Judiciary" (1964) 4 J. Family L. 117, at p. 128:

"Since it is necessary that the spouses not only identify their problems, but also discuss them with complete candor, they must first be convinced that their statements will be held in strict confidence and not used in subsequent matrimonial proceedings. Another factor which might make the couple reluctant to accept the advice of the counselor might be the fear that a resumption of conjugal relations would create the defense of condonation in the event that the reconciliation did not last. This would be of particular concern when reestablishment of the original ground for divorce would consume substantial time (i.e., desertion) or would be unlikely to arise again. Unless the legislation establishing conciliation procedures specifically provides for the confidentiality of conference discussions and for vitiation of the defense of condonation if an attempted reconciliation fails, many persons would have a legitimate fear that conciliation procedures would prejudice their rights if asserted at a later time."

- 389. For analysis and critical comment on this section, see Leslie Katz, Privilege and Reconciliation Attempts, Unpublished Paper, January, 1973.

390. Judge H.A. Allard, "Family Courts in Canada", in Mendes Da Costa, *Studies in Canadian Family Law* (1972), Ch. 1, at p. 20.
391. Justice William B. Lawless, "Compulsory Conciliation for New York" (1965) 14 Buffalo L.Rev. 457, at p. 458. See New York Family Court Act, 1962, § 915.

See also Commission on Children and Youth, State of Hawaii, Report No. 28, A Proposal for the Establishment of a Family Court in the First Circuit of Hawaii, July, 1964, at p.5:

"It is vital that any information secured from the parties during the marriage-counseling process, as distinguished from a social study, be privileged, that is, immune to disclosure in court without the consent of the party providing the information. This protection is necessary because many persons would be reluctant to enter into the marriage-counseling process if the information divulged could be used against their interests."

392. Report of The Governor's Commission on the Family, California, 1966, at p. 22.
393. Judge William E. MacFaden and Meyer Elkin, "The Case for a Family Court: Progress or Chaos" (1968) Conciliation Courts Review, Vol. 6, Pt. 2, at p. 6.

See also ibid., at pp. 11-12:

"CONFIDENTIALITY. To be effective, counseling in any setting must rest upon a confidential relationship between counselor and client. Unless a client feels that all written and verbal communication between him and the counselor is privileged, he will not share the kind of facts and feelings which enable a counselor to understand and to be effective.

Although the Act recognizes the need for privileged communication in conciliation counseling, it is not sensitive to the confidential relationship in other areas of counseling in a Family Court. For example, on page 85 of its report, it states 'the Act emphasizes, however, that this privilege should apply only to communications made during reconciliation counseling and not to information imparted during the initial evaluation or subsequent investigations.'

The initial evaluation intake conference should also be privileged. If the intake counselor is unable to assure the parties that whatever they tell him is privileged, the interview will undoubtedly be unproductive and could have a negative impact on further counseling contacts with the court, particularly for reconciliation counseling.

In any court counseling service, there are three different needs that must be met by such a service, as follows:

1. The client's needs.
2. The court's needs; to insure that the responsibilities conferred upon the court by law, are carried out.
3. The counselor's need to carry out the intent of the law in a manner which satisfies the law and at the same time permits the counselor to follow basic counseling principles. If the counselor cannot relate himself to basic counseling principles, such as confidentiality, his service suffers, the client's needs are not met, and therefore the goals of the court, as outlined in the law, cannot really be met. As a guiding principle, it may be said that as soon as the counselor is required to submit a written report to the court, and this report may become a factor in adjudication, then the counselor is no longer a counselor, but an investigator for the court. To be effective, a counselor can only wear the hat of a counselor--not two hats, the other hat being that of the investigator. It is extremely important that the counseling and investigating functions be sharply differentiated

When a counselor is designated by the court as an investigator for the court and deals with such areas as custody or other matters requiring adjudication, it is agreed that privileged communication is

not possible or desirable. However, at no time should the client have access to the court's reports or records, such as being able to see an investigator's report regarding child custody. It is also felt that the counselor assuming the role of investigator should be able to submit his report to the court without having to first consult with the attorneys in the case."

- 394. Report of The Governor's Commission on the Family, California, 1966, at pp. 24-25.
- 395. Judge William E. MacFaden and Meyer Elkin, "The Case for a Family Court: Progress or Chaos", Conciliation Courts Review, Vol. 6, Pt. 2, at pp. 12-13.
- 396. O. Omlid, Marital Counseling Program Report, 1966 (unpublished report to district judges), cited by D. Evavold, "Family Courts in North Dakota" (1968-69) 45 North Dakota L. Rev. 281, at p. 288.
- 397. Professor Loy M. Simpkin, Marriage Counseling For Texas, September, 1969, at pp. 49-50.
- 398. Professor Henry H. Foster, Jr., "Conciliation and Counseling in the Courts in Family Law Cases" (1966) 41 N.Y. Univ. L. Rev. 353, at p. 355.
- 399. Judge Paul W. Alexander, "The Lawyer in the Family Court" (1959) 5 N.P.P.A.J. 172. See also Judge Paul W. Alexander, "The Family Court — An Obstacle Race?" (1958) 19 Univ. Pitt. L. Rev. 602, at 611:

"Somehow we wonder if trying to keep social work out of the court isn't like trying to keep the Salvation Army out of the Bowery or keeping Travelers' Aid out of all the passenger stations.

Why not take the needed service where the people are who need it? In the simplest military strategy, if the enemy must file through a narrow pass, that is where we concentrate our fire. The merchant with goods to sell doesn't hide them in a side street, but pays high rent to display them on the busy thoroughfare. The manufacturer doesn't post his advertisements in some secluded, out of the way spot, but beside the broad highway for all to see. And the State which honestly wants to pay more than

lip service to the stability of family life will not sit silently in the side street and wait for the victims of marital malaise to find their way to the clinic; it will place its help where it will not be by-passed or side-stepped, to wit, right in the middle of the harrowing highway down which these unhappy victims are lugging their sick and moribund marriages for legal interment by the divorce court. Right in that court—where the people are—that is where the State will set up and offer its ameliorative services. Perhaps some day the people will learn to turn first to churches and private agencies for help. Until that happy day arrives it looks as if the State were stuck with this obligation, and presented with this opportunity."

See also Brief of Daryl E. McLean, Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, Ottawa, April 20, 1967, at pp. 1540-1542.

400. Judge William E. MacFaden and Meyer Elkin, "The Case for a Family Court: Progress or Chaos", Conciliation Courts Review, Vol. 6, No. 2, (December, 1968) 1, at p. 14.
401. Commission on Children and Youth, State of Hawaii, Report No. 28, A Proposal for the Establishment of a Family Court in the First Circuit of Hawaii, July, 1964, at pp. 10-11.
402. Probation Officers Association, Ontario, Report of the Research Committee on Marriage Counselling and Conciliation Procedures in the Juvenile and Family Courts in Ontario, in Ontario Family Law Project, Vol. X, Family Court and Social Services, Appendix B to Chapter 2.
403. See text to footnote 276, supra.
404. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 95-96.
405. See Judge Lester E. Olson, The Conciliation Court of Los Angeles County, 6th ed., 1970, at p. 18:

"35. HAS THE PETITION FOR CONCILIATION BEEN USED BY ONE OF THE PARTIES FOR THE PURPOSE OF DELAY OR TO TAKE ADVANTAGE OF THE OTHER?

The Conciliation Court Act (Sections 1730-1772 CCP) was originally interpreted as providing that upon the filing of a petition all further dissolution proceedings would be automatically stayed for a period of thirty days.

In certain instances the petition for conciliation was used for delaying tactics, usually by the husband. This is no longer possible since 1955, when this provision in the law was clarified. Since that time the 30-day stay plainly applies only in those cases where no dissolution proceeding has been filed. In other words, if a wife files for dissolution of marriage and the husband thereafter files a petition in the Conciliation Court, the wife can still proceed to bring an order to show cause regarding temporary support, child custody, restraining orders, etc., and have the matter heard and disposed of on the family court calendar.

The petition contains a paragraph whereby the petitioning party agrees to refrain from any disposition of community assets which would detrimentally affect the other party."

406. See footnote 405, supra. See also Judge Laurens L. Henderson, "Marriage Counseling in a Court of Conciliation" (1969) 52 Judicature 253, at p. 254:

"Under the Arizona Statute, (Sec. 25-381.06 *et seq.* A.R.S.) exclusive jurisdiction over a couple and their marital problems attached when a spouse files in the Conciliation Court a petition for conciliation. The Act states its purposes are:

'to promote the public welfare by preserving, promoting and protecting family life and the institution of matrimony, to protect the rights of children, and to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies.'

A divorce case may or may not be pending. If a divorce case is pending, the judge of the Conciliation Court enters an order transferring the divorce case to the Conciliation Court, and staying all proceedings in the divorce court for a period of 60 days, unless the parties stipulate for an extension of time. The stay is lifted sooner if the parties fail to reconcile.

The Conciliation Court judge, under our statute, can make any appropriate temporary or *pendente lite* order in like manner as can a divorce court judge. As a matter of policy, however, if temporary orders are requested, and a petition for an Order to Show Cause is filed seeking support money for children and custody, the hearing is referred by the Conciliation Court to a Court commissioner, who is authorized to make any appropriate *pendente lite* or temporary orders acting for and on behalf of the judge of the Conciliation Court. Thus the Conciliation Court judge himself is not placed in the position, on the one hand, of trying to reconcile a couple and, on the other hand, of making orders in favor of one spouse and against the other, as in the usual adversary proceeding. Often our counselors are able to obviate the necessity for such a hearing, thus avoiding a confrontation of the spouses in an adversary proceeding."

- 407. Professor Henry H. Foster, Jr., "Conciliation and Counseling in the Courts in Family Law Cases" (1966) 41 N.Y. Univ. L. Rev. 353, at pp. 378-379.
- 408. See Brief of Daryl E. McLean, Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, Ottawa, April 20, 1967, at pp. 1540-1542.
- 409. Report of the Subcommittee on Conciliation, June 1961, Family Law Section, American Bar Association. For a summary of the conclusions presented in the text, see Professor Henry H. Foster, Jr., loc. cit., supra, footnote 124:

"124. It was recently suggested that the proper approach for a conciliation court system would include: (1) judicial supervision of reconciliation efforts; (2) counseling by trained personnel, not judges;

(3) a subsequent visit to the judge by reconciled couples to impress on them the importance of this step; (4) a simple and direct procedure to invoke the court's services, available before as well as after a divorce action is commenced; (5) no filing fee or charges for counseling; (6) court files and communications to counselors that are confidential; (7) award of attorney's fees; (8) provision of short term counseling only; (9) persuasion, not coercion, of couples to use the service; (10) a limitation on caseloads for the counselors; (11) community publicity and education to create support for the program; (12) an imaginative, rather than bureaucratic, court and staff. ABA Family Law Section, Report of the Subcommittee on the Conciliation Court 6-13 (1961), in Ploscowe & Freed, Cases on Family Law 647-50 (1963)."

See also Justice Louis H. Burke, "Need for Standards for Conciliation Courts" (1971) Conciliation Courts Review, Vol. 9, Pt. 1, at pp. 2-3:

"CONCILIATION EFFORTS IN A COURT SETTING
ARE EFFECTIVE WHEN---

*COUNSELING IS CONDUCTED BY PROFESSIONALLY TRAINED
COUNSELORS*

Having at least a master's degree in a behavioral
science,

Under the direction of a chief counselor who has
had at least five years clinical counseling experience,

In sufficient numbers to carry the load,

Adequately compensated, with fair retirement benefits,

With security of tenure, subject to an expeditious
method of removal for cause,

UNDER THE DIRECT SUPERVISION OF A DEDICATED JUDGE

Selected because of interest and ability in family
law, and not solely by reason of seniority or rota-
tion,

Under assignments of sufficient duration to warrant continuing interest and study,

Whose duties are supervisory and supportive but do not include actual counseling for which he is not professionally trained, and

Whose functions include enlisting the active support of the bench and bar, the cooperative assistance of social work agencies and the support of the community at large,

OPERATING IN AN EFFICIENT FAMILY COURT SYSTEM

With noncounseling and nonjudicial duties performed by a competent clerical and secretarial staff,

With offices in close proximity to the judge's courtroom and chambers to permit frequent contact and staff conferences,

With the services of psychologists, psychiatrists or other specialists made available on a consulting basis,

With a preliminary screening process of cases in order that maximum efforts may be devoted to families whose counseling needs are greatest, and

With ready access to the court for necessary proceedings for temporary support, child custody, restraining orders not interfered with by the conciliation procedure,

USING MODERN MARRIAGE COUNSELING PROCEDURES

Providing quick access for preliminary interviews, to substitute hope for despair where possible, and,

Available both in advance or after divorce proceedings are filed,

With the confidentiality and privacy of files and counseling sessions fully protected by law,

Utilizing modern techniques, such as group counseling,

Supplying short-term counseling only, and,

Through the cooperation of community or private agencies assisting couples to secure long-term counseling where needed,

AND UTILIZING WRITTEN HUSBAND-WIFE AGREEMENTS

Whenever possible where reconciliation efforts are successful,

As a workable tool in insuring the permanence of a reconciliation,

As a blueprint for a successful marriage,

For the instructional value of such agreements on problems common to many marriages,

To serve as a memorial of promises made as to the future conduct of the parties,

To have the psychological value of a form of new role playing, and,

Where consented to by the parties, to form the basis for a court order governing future conduct, and,

Containing provisions for termination of both the agreement and court order upon request of either party and notice to the court and the other party, but,

With contempt powers of the court made available where serious violations occur while the agreement and order remain in effect."

410. Meyer Elkin, "Family Law Reform: California's Constructive Break With Legal Tradition" (1971), Conciliation Courts Review, Vol. 9, No. 1, at pp. 10-12.
411. A pilot project modelled in part on the conciliation procedures adopted in the Los Angeles Conciliation Court is currently being undertaken in the Edmonton Family Court. This constitutes the first attempt in Canada to examine the feasibility of adopting or adapting the procedures of the United States Conciliation Courts.
412. See loc. cit., footnote 408, supra, at pp. 1541-1542, citing Ralph P. Bridgman, "Counseling Matrimonial Clients in Family Court" (1959) 5 N.P.P.A.J. 187, at p. 193.
413. See loc. cit., footnote 407, supra, at pp. 376-377.
414. Civil Code Revision Office, Working Paper on the Establishment of a Family Court in Quebec, January, 1973, Recommendations 42-44; see text supra, at p. 362.

415. Institute of Law Research and Reform, Alberta, Working Paper, Family Court, April, 1972, at pp. 78-80.
416. See text supra, at pp. 330-333.
417. See, e.g., P.J.E. Cole, "Family Courts--Their Nature and Function" (1971) 4 Man. L. J. 317, at p. 342, citing Ontario Family Law Project, Vol. 10, Family Court and Social Services, at p. 246:

"To assist in the general development of policy for the new court, and to establish standards for the recruitment, training and qualifications of the personnel, a small Family Court Council is recommended, reporting directly to the Attorney General.

'All ancillary services should be departments of the family court system and should work under the general direction of the Chief Judge as officers of the Family Court system.'

This is a vital provision and one to be highly commended."

And see Probation Officers Association, Report of the Research Committee on Marriage Counselling and Conciliation Procedures in the Juvenile and Family Courts in Ontario, in Ontario Family Law Project, Vol. X, Family Court and Social Services, Appendix B to Ch. 2:

"4. Where should the responsibility for the direction of marriage counselling lie?

This should continue to be under the direction of the Judge. He should lay down general policy in the light of the local situation giving full consideration to the ability of his Probation Officers to undertake this work. He would, of course, continue to make referrals from the Court.

The actual counselling process should be under the direction of the Probation Officer who would decide questions of type, depth and quantity and when to refer his clients to other resources."

See also University of Birmingham, Institute of Judicial Administration, Family Courts: Comments on a Paper prepared by the Family

Courts Working Party of the Law Commission, April, 1972, at pp. 9-10, paras. 24-26.

"24. The Working Party asks, (para.4), what relationship should there be between the family court and the social welfare services (including social security)?.

We must confess to being attracted to the Working Party's first, bold suggestion that the family court be part of a new social welfare organization providing all family services. But this would seem to necessitate a colossal administrative change. We doubt whether the conceded advantage of 'total over-view' of the family, which this change would seek to advance, justifies such a revolution. There might also be some psychological barrier to a court and a welfare organization in the same building. So we prefer the second suggestion, that the family court should be concerned with the primary role of adjudication and with a clearly defined welfare responsibility. Indeed, we favour the closest liaison between the family court and the appropriate social welfare agencies and government departments. In many cases, the legal and social aspects of a family problem are inextricable. For instance, an unmarried mother on Supplementary Benefit has a duty to take action against the father for an affiliation order. Hitherto, the lack of liaison between the court and the social welfare services in such an instance has resulted in much hardship.

25. Most assuredly, the family courts should concern themselves with welfare questions of the widest character. The court ought to have power to adjourn any case at any time to explore the possibility of welfare help.

For example, the provision for marriage counsellors attached to family courts would enable statutory reconciliation provisions (at present only in the Divorce Reform Act) to have a much greater chance of success: they should come into operation effectively at an earlier stage in the matrimonial history, for instance, when the wife applied for maintenance, or when a child of the family committed a juvenile wrong.

26. We suggest that the following services at least should be in the court's control and, preferably

in the precincts of or in the vicinity of the court:-

- (a) a Marriage Guidance Bureau;
- (b) Child psychologists;
- (c) Psychiatrists or psychiatric social workers
- (d) General social workers;
- (e) A legal aid and advice bureau."

418. See text supra, at pp. 354-356.

419. See text supra, at pp. 357-358. See also P.J.E. Cole, "Family Courts - Their Nature and Function" (1971) 4 Man. L.J. 317, at p. 340:

"The court itself should be administered by the same government department that runs the other courts. This is essential if the court is not to become a 'social workers court,' as happened to many of the American courts. *To be effective a family court must be a court of law, a court of justice, and a court of lawyers.*

'Whether the social staff should be included in the same administration is a controversial issue. If the court is to function as Judge Alexander thought it should, as '...a single integrated court, having one staff of specially skilled personnel, with one philosophy, one underlying purpose, working as one team, with one set of records, all in one place, under one direction, that of a specialist judge or judges,' then the ancillary social services must also be under the direction of the Attorney General's Department. Both Ontario and Alberta have had recommendations to this effect."

420. Professor Henry H. Foster, Jr., "Conciliation and Counseling in The Courts in Family Law Cases" (1966) 41 N.Y. Univ. L. Rev. 353, at pp. 377-378.

421. See text to footnote 204, supra, at pp. 192-193. In the context of juvenile delinquency and neglect, see U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at pp. 124-125:

"The court should not be considered as an instrument in the field of primary prevention of delinquency and neglect. Primary prevention is the responsibility of the family, the school, the church, as well as a great variety of agencies, both public and private, whose programs are designed to improve all facets of American life. The court, however, has a responsibility to join with and support all efforts focused on this purpose.

The court is one of a number of agencies involved in contributing to secondary prevention, namely, prevention through correction or treatment. If it is to discharge this responsibility effectively, it should have available good child-care treatment and preventive service, which may be furnished by public and voluntary social agencies providing care and service for children and families, churches and their affiliated activities, recreational and other group work agencies, police departments, particularly juvenile bureaus, child guidance clinics, and health departments. It is essential that the court maintain good working relationships with these agencies.

Since the common objective of the court and the agencies is to provide care or treatment for children, there must be mutual respect and willingness to work together. Mutual respect, in this case, is more than personal admiration. It involves regard for the tenets of each other's profession and for the contribution each can make. A court cannot work effectively with an agency which does not recognize the rights of individuals assured by law and the court's function to protect these rights. An agency cannot work effectively with a court which believes the treatment or social processes used by the agency are only incidental to its ability to provide a child with a bed, or which believes it should direct each step of care and treatment.

Respect also involves a willingness by the court to permit the agency to make certain treatment decisions for which it is qualified. It also includes agency recognition and acceptance of the fact that certain decisions affecting the rights of a child or parent which involve treatment must be made by the court. It is extremely important, therefore, that each have a clear understanding of where powers and responsibilities begin and end, with regard to each other and to parent and child. The use of written court-agency agreements is an excellent means of reducing misunderstandings and promoting harmonious working relationship.

Although one of the court's major concerns will be with the agencies having a direct bearing on its cases, it should also work to improve such general services as recreation, financial assistance, family counseling, protective service, maternity home care, education, and child guidance, through cooperative planning, publicly expressed support, legislative backing, and other processes of community organization.

The court is in a particularly good position to see the gaps in sound community relations and in developing interest in the work of the court.

It is important that the court have a good working relationship with a number of different professional groups. Such a relationship must be particularly developed with the legal profession."

- 422. Report of The Governor's Commission on the Family, California, 1966, at p. 14.
- 423. Canadian Corrections Association and Canadian Welfare Council, The Family Court in Canada, November, 1960, at pp. 2-3, paras. 3(d) and 4. Compare 'Commission on Children's and Youth,' State of Hawaii, Social Aspects Related to the Establishment of a Family Court in the First Circuit Court of Hawaii, December, 1963, at p. 44:

" A Family Court with jurisdiction over divorce cases inherits a problem where time is of the essence. As an example, a couple comes to Court determined to secure a divorce immediately but, as the case unfolds there appears some possibility that reconciliation is possible if this couple could discuss their problems with a neutral party who is trained, experienced and competent in helping them arrive at a reasonable program so that they agree that divorce is not the solution. It is of the utmost importance

that they be referred immediately, the same day if possible or the next day, to a marriage counselor (the neutral party mentioned above). Would marriage counseling services as provided currently by other community agencies be able to provide the services as requested by the Court and within the time desired by the Family Court? This is a key question in the mind of this committee.

From observation of the problem this committee would be inclined to recommend that Marriage Counseling be included as a basic service of the Family Court, First Judicial Circuit, State of Hawaii with the proviso that such Marriage Counseling Services of the Family Court be:

1. Utilized whenever other community resources are not able to provide marriage counseling services to couples, with families, seeking divorce within the time limit deemed necessary by the Family Court Judge;
2. Provided by the Family Court only to the point where the case could be referred to another community agency for continued necessary services."

424. Probation Officers Association, Ontario, Report of the Research Committee on Marriage Counselling and Conciliation Procedures in the Juvenile and Family Courts in Ontario, in Ontario Family Law Project, Vol. X, Family Court and Social Services, Appendix B to Chapter 2.

425. See Ontario Family Law Project, Vol. X, Family Court and Social Services, Appendix A to Ch. 2. See also Brief of Ontario Welfare Council, Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, Ottawa, March 14, 1967, Appendix 76, at p. 1373:

"Juvenile and family courts, particularly, tend to refer those who seem to require long-term counseling to family agencies and often expect these agencies to function with the authority of probation staff. But family agencies do not have this status, and partly because of this, but also because there is poor liaison between courts and family agencies, the latter seem to lose

many of these people. Several respondents suggested that new legislation in Family Law should provide for purchase of service from qualified family agencies and that procedures for referrals, consultation and assessment between courts and family agencies should be formalized."

As to possible alternative methods of financing counselling facilities, see Matrimonial Causes Act (Australia), 1959, section 9, whereby the Attorney-General of the Commonwealth of Australia may make financial grants in aid of approved marriage guidance associations. Consideration might also be given to the financial "seeding" of volunteer counselling services as in Snohomish County, Washington, or to an extension of the medicare programme. In this latter context, L.E. Tauber, ["A Clinical Psychologist Speaks Out About Marriage Therapy" (1972) 5 R.F.L. 129, at p. 139], has observed:

"While marriage therapy is not a panacea, with the current health insurance scheme the majority of those needing it, cannot use their insurance to pay for marriage therapy. Hopefully, those in a position to do so will make these inequities known to those who can change it."

426. See text to footnote 204, *supra*, at p. 193. See also Note, "The Family in the Courts" (1955-56) 17 Univ. Pitt. L. Rev. 206, at p. 254.

"Community planning in cooperation with municipal and county authorities should be a function of the court. Where it is found that there is a high incidence of delinquency, neglect, divorce, and inter-family difficulties in a given area, such area should be investigated and studied with the view of eliminating, where possible, harmful factors which produce family deterioration. Special police officers and visiting teachers should be attached to the court to assist in such investigation and planning. Such community planning is an important function of the Domestic Relations Court for Mahoning County, Ohio (Youngstown), and has produced spectacular results."

427. For valuable commentaries on the various systems operating in the United States, see Professor Henry H. Foster, Jr., "Conciliation and Counselling in the Courts in Family Law Cases" (1966) 41 N.Y. Univ. L. Rev. 353; Elizabeth D. Dyson and Richard B. Dyson, "Family

Courts in the United States" (1968) 8 J. Family L. 505, (1969) 9 J. Family L. 1; Alice O'Leary Ralls, "The King County Family Court" (1953) Washington L. Rev. 22; D. Evavold, "Family Courts in North Dakota" (1968-69) 45 North Dakota L. Rev. 281. For a selective annotated bibliography of materials relating to Family Courts, see Report of The Governor's Commission on the Family, California, 1966, Appendix B.

Compare the procedures operating in Japan: see Yorihiro Naito, Chief Judge, Tokyo Family Court, "The Family Court of Japan" (1969) 19 Juv. Ct. Judges J. 130, at pp. 131-132:

"In Japan, any person who wishes to bring an action for divorce must apply for conciliation proceedings in the Family Court before doing so. The reason for this is the special recognition given to mutual concession of the parties concerned for the harmonious solution of family affairs rather than in open court hearings. Therefore, in case court action is resorted to initially, the court concerned must refer the case to the Family Court for conciliation proceedings.

However, if both parties to a divorce are Japanese and have agreed to the divorce and there is no matter in dispute, the divorce may be obtained simply by effecting notification to the local government having custody of the family register of the parties concerned.

Conciliation proceedings shall be conducted by the conciliation committee which consists of a judge and two or more conciliation commissioners. One of the commissioners is usually a woman.

Conciliation commissioners are not government officers in the strict sense. They are members of the general public who are nominated by the Family Court on the basis of their social conscience and moral spirit among the people engaged in business, commerce, agriculture, public service, law, education, religion, or housekeeping.

In conciliation proceedings, divorce cases may end in reconciliation and rehabilitation of the matrimonial relationship or in agreement for divorce."

428. Jon M.A. McLaughlin, "Court-Connected Marriage Counseling and Divorce -- The New York Experience" (1972) 11 J. Family L. 517, at pp. 532-535.
429. Ibid, at pp. 545-546.
430. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 40-41.
431. See text to footnote 410, supra. See also Justice William B. Lawless, "Compulsory Conciliation for New York" (1965) 14 Buffalo L. Rev. 457, at pp. 459-461.
432. See Judge Lester E. Olson, The Conciliation Court of Los Angeles County, 6th Ed., January, 1970, at pp. 18-19, para. 37. See also The Conciliation Court, 1970 Annual Report, Superior Court, County of Los Angeles, at pp. 7-8. And see Meyer Elkin, "Family Law Reform: California's Constructive Break With Legal Tradition" (1971) 9 Conciliation Courts Review 9, at p. 15.
433. Judge Lester E. Olson, loc. cit., supra, at pp. 14-15, paras 26-27. See Meyer Elkin, "Short-Contact Counseling in a Conciliation Court", Social Casework, April, 1962:

"One of the special characteristics of the Conciliation Court's service is its constructive use of authority. For example, in the original letter offering an appointment for a conciliation conference this sentence appears: 'We trust you will keep this appointment voluntarily and avoid the necessity of requiring the Court to issue a subpoena.' Authority is also implicit in the court order the judge issues to the two parties after they have worked out a reconciliation agreement. The judge frequently issues this order to the couple while he is talking with them briefly in his chambers to congratulate them for their wise decision to attempt a reconciliation. Again, a flagrant violation of the reconciliation agreement--such as one partner's inflicting abuse on the other or continuing a relationship with a paramour--may result in the Court's instituting a contempt proceeding. The Court rarely exercises this power, however, since the Court focuses on encouraging the partners to accept marital counseling, through which they may be able to develop greater internal control over their acting-out behavior.

The final symbol of the Court's authority is the citation, which requires the respondent to appear at a stated time and place. In 1960 the Court exercised its citation power only 31 times. A citation is used only when there is evidence that such action may accomplish a constructive purpose for the welfare of the family. It is not used simply for the purpose of harassing, embarrassing, or punishing the respondent, or without the full consent of the petitioner. For example, in the case of a third-party paramour, a citation is sometimes issued to the third party, with the consent of both the petitioner and respondent. A court order may then be issued in which the respondent and the third party agree to end their relationship. When a woman has left her husband, and when her parents do not permit her to see him, she can find a citation helpful in giving her legal support to take part in a conciliation conference. A citation can also be used to require in-laws to meet with the counselor. When necessary, the judge can issue a court order restraining them from interfering in the marriage, provided both partners agree.

Our experience has shown that the use of authority can facilitate the process of short-contact marital counseling. In some instances the respondent seems to have backed himself into a corner from which he cannot escape without further injury to his pride and an increase in his guilt feelings. A citation to appear for a counseling conference can then become a face-saving device that permits him to keep the appointment and get help.

The use of authority makes exacting demands on the professional counselor. In order to use authority wisely, he must have sound professional judgment and a high degree of self-awareness, so that he can examine his own motivations in exercising authority or in being reluctant to exercise it. By virtue of the Court setting, the conciliation counselor becomes a powerful authority figure in the eyes of the client,

despite the fact that basically the counselor is as nonauthoritative as he would be in any setting. Clients often equate authority with strength; the Court becomes the strong figure on which they can lean when the home situation is in a state of turmoil and crisis, and when the individuals' personal feelings are confused and conflicted."

And see Judge William E. MacFaden and Meyer Elkin, "The Case for a Family Court: Progress or Chaos", Conciliation Courts Review, Vol. 6, No. 2, December, 1968, at pp. 5-6:

"It is pointed out later in this article that in all cases where mandatory conciliation has been required the project of experiment has failed miserably and the conciliation movement has received either a long or permanent set-back in any jurisdiction where it has been tried. We submit, therefore, that this is a very dangerous provision to incorporate in a Family Court Act. In any event, it should not be done without a phase-in or experimental period. Secondly, those of us who work in the large metropolitan counties and have some experience with the conciliation process are fully aware of the difficulties in obtaining adequate, competent, professional conciliation counselors. Both the Commission and the authors of the current legislation seem to have taken the position that there is and will be no difficulty in quickly and adequately training and securing professional staff. Such an attitude completely ignores the facts of life, fails to take into consideration the fact that none of our universities or colleges are at the present time equipping their undergraduates or their candidates for advanced degrees with the training desirable and essential in this field. The conciliation department of the Court in Los Angeles County has since its inception required a minimum of ten years counseling experience for its conciliation counselors and if this requirement were cut to five years it would not be possible in the foreseeable future for this court to obtain the necessary professional staff if conciliation became mandatory."

As to the use of mandatory counselling procedures in the Utah Family Court, see Elizabeth K. Ryser and Allen L. Hodgson, "Mandatory Counseling—One Approach", Conciliation Courts Review, Vol. 9, No. 1, September, 1971, at pp. 25-28.

See also H.A. Finlay, "Commonwealth Family Courts: Some Legal and Constitutional Implications" (1970-71) 4 F.L.R. 287, at pp. 304-305:

"Together with any further liberalisation of the divorce laws should therefore go a greater degree of support for any measures designed to prevent marriage breakdown. The greater availability of marriage guidance facilities is one such measure that should be explored. The present legal provisions have already been referred to. Not only should the number of trained marriage counsellors be greatly increased, but while compulsion seems undesirable as a general proposition, greater inducements must be found for people with matrimonial problems to consult them. One proposal in that direction was recently put forward, the result of which virtually amounts to a divorce ground of irretrievable breakdown, based upon an inquiry by two trained marriage guidance counsellors. Other means of achieving this include much greater publicity for marriage guidance, for example by making the legal profession more aware of what marriage guidance involves. If divorce by consent or by unilateral application is to be allowed, it seems not unreasonable for society to say to the applicants that, having regard to interests other than those of the applicants themselves that are involved, society must satisfy itself that the marriage has in fact irretrievably broken down. Divorce therefore would not become automatic upon application and due regard for the institution of marriage would still underlie the work of the agencies dealing with divorce."

131. See Submission of Ontario Welfare Council to Ontario Law Reform Commission, Ontario Family Law Project, Vol. 10, Family Court and Social Services, Appendix A to Ch. 2. See also Brief of Ontario Welfare Council, Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, Ottawa, March 14, 1967, Appendix 76, at pp. 1376-1377:

"By the time problems reach the stage of court action, compulsory conciliation, in our opinion, could have an adverse rather than a positive effect. Nevertheless, many people who institute legal proceedings could be helped through skilled marriage counselling to reconcile their differences. Therefore we believe that a high quality professional counselling service should be available in family and divorce courts. The service should not be compulsory but should be offered routinely before a charge is laid in family court or action for divorce is filed."

435. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 36-37 and 39-40.
436. Judge William E. MacFaden and Meyer Elkin, "The Case for a Family Court: Progress or Chaos", Conciliation Courts Review, Vol. 6, Pt. 2, at p. 12. See also Conference of Conciliation Courts, Model Conciliation Court Law, 1968, section 5(b) and comment:

"5. (b) The conciliation court shall have jurisdiction whenever it appears to the judge of said court that there exists any controversy between parties which may result in the dissolution or annulment of marriage or a disruption of household, or which may affect the best interests or welfare of minor children. Jurisdiction shall extend to the parties and to all other persons having a relation to the controversy whether or not there are minor children, and whether or not there is previously filed complaint or petition pending before any domestic relations court."

[Comment]

"This provision permits, but is not mandate for, the referral, direction, or ordering of parties before some other court to the conciliation court for evaluative interview. These other courts include, but are not limited to, those hearing divorce, annulment, or separate maintenance and related matters, assault and battery complaints juvenile matters, petitions of mental illness, paternity, and adoption, The provision likewise allows for persons to petition the services of conciliation on referral from lawyers, doctors, ministers, and any other profession or group of-fering helping services to troubled people, and for direct inquiry by persons having the alertness to reach the court without being referred."

437. Jon M.A. McLaughlin, "Court-Connected Marriage Counseling and Divorce —The New York Experience" (1972) 11 J. Family L. 517, at pp. 535-537.
438. Compare text to footnotes 339 and 340, supra, at pp. 320-323.
439. Report of Subcommittee on the Conciliation Court to Matrimonial Actions Committee, Family Law Section, American Bar Association, June, 1961, at pp. 5 and 8-9.
440. Conference of Conciliation Courts, Model Conciliation Court Law, May, 1968, at p. 9, footnote 4.
441. Judge William E. MacFaden and Meyer Elkin, "The Case for a Family Court: Progress or Chaos" (1968) Conciliation Courts Review, Vol. 6, Pt. 2, at p. 11. See text to footnote 410, supra, sub-heading "The Counseling Process". And see Meyer Elkin, "Short-Contact Counseling in a Conciliation Court", Social Casework, April, 1962; The Conciliation Court, Superior Court, Los Angeles County, 1970 Annual Report, at p. 20.

See also Judge Laurens L. Henderson, Supervising Judge of Maricopa Conciliation Court, Arizona, "Marriage Counseling in a Court of Conciliation" (1969) 52 Judicature 253, at p. 255:

"The type of counseling in a Conciliation Court is generally referred to as 'short-term' or 'crisis' counseling, and special techniques are developed by counselors in dealing with this type of situation. This contrasts with counseling continuing over an extended period of time. When counselors feel continuing care is needed, an appropriate suggestion is made to the spouses that they themselves follow up with continuing counseling outside of the court. This may consist of a referral to a community family case work agency, or to a psychiatrist, or to a pastor or private counselor."

442. Jon M.A. McLaughlin, "Court-Connected Marriage Counseling and Divorce —The New York Experience" (1972) 11 J. Family L. 517, at pp. 539-544.
443. Ibid., at pp. 546-547.
444. See text supra, at pp. 188-192 and 234-239.
445. See Professor Loy M. Simpkin, Marriage Counseling For Texas, 1969, at pp. 55-56:

"However, if court-connected marriage counseling is agreed upon as a feasible means of supporting state policy in preventing marriage breakdown, a variety of plans are available. Certainty of results cannot be expected. Consistency cannot be achieved in an emerging profession having various attitudes and training. Effectiveness will continue to be the subject of debate and discussion.

Although further research is being undertaken by the American Bar Foundation to determine the effectiveness of counseling in the conciliation courts such research is not likely to be completed for a number of years and may even then be inconclusive as to the results which are obtained. This is because of the difficulty of defining the goals of marriage counseling and of measuring its effectiveness in securing these goals.

The primary question that remains is whether or not marriage counseling as a part of the judicial system is desired at all."

See also Professor Robert J. Levy, Uniform Marriage and Divorce Legislation: A Preliminary Analysis, National Conference of Commissioners on Uniform State Laws, at pp. 120, 123, 127, and 130:

"[In] discussing conciliation, and in making choices about it, we will not be dealing with known facts as to the functions conciliation can and does serve or its efficiency in serving those purposes; rather, of necessity we will be exploring hunches, guesses, surmises and biases. ...

[It] is not at all clear--from the data available --whether all, or even any, of [the] claims in behalf of conciliation are valid; more important, the issue must be phrased in terms which acknowledge the authoritarian nature of the program: are the goals of a conciliation program of sufficient importance (and likely enough to be achieved) to justify the program's interference with the personal autonomy of divorcing spouses? Currently at least, the issue must be resolved in the negative. Without exploring all of the evidence in great detail or exhaustively reporting every argument and counter-argument (most of them have been endlessly repeated in the literature in recent years), the following paragraphs report the factual and policy underpinnings for this conclusion.

With the exception of reports emanating from the Los Angeles Conciliation Court (whose statistical reports bear careful scrutiny)—and optimistic (and perhaps premature) claims for the Wisconsin experience, — the prevailing opinion seems to be that court-connected conciliation services are a waste of time and money. ...

We must recognize, nonetheless, that the interest in conciliation in a court setting is symptomatic of widely shared notions that something should be done to help troubled couples on the brink of divorce. A number of alternatives to a conciliation service should be considered. The most appropriate program—one that deserves vigorous support from the Conference—is totally removed from the responsibility of this Committee: The States (and the federal government) should be encouraged to give extensive financial support to voluntary family counseling agencies and to education and training for family counselors, and to enact standards (by licensing and other means) for agencies which engage in 'marriage counseling' endeavors. ...

In sum, there are a number of devices—less expensive for the community and less intrusive for the spouses than a conciliation service attached to the court—through which the divorce process may be able to insure that only those spouses who 'really' want a divorce and 'should' obtain a divorce will in fact obtain a divorce."

446. D. Evavold, "Family Court in North Dakota" (1968-69)45 North Dakota L. Rev. 281, at pp. 285-286. See also Report of Subcommittee on the Conciliation Court to Matrimonial Actions Committee, Family Law Section, American Bar Association, June, 1961, at p. 9, para 5:

"No filing fees should be required, and no charges made for marital counseling, thus removing a further impediment to soliciting the court's assistance."

447. U.S. Department of Health, Education and Welfare, Children's Bureau Publication 472-1969, Legislative Guide for Drafting Family and Juvenile Court Acts, at p. 44(section 42).
448. See text supra, at p. 362, Recommendation 43.
449. Ibid., Recommendation 44.
450. Justine Wise Polier, Judge, New York State Family Court, A View From The Bench, N.C.C.D., 1964, at p. 67.

451. See text to footnote 401, supra.
452. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, at pp. 85-89.
453. Compare text to footnote 456, infra.
454. Compare Domestic Proceedings Act (New Zealand), 1968, section 10:
- "10. Appointment of counsel or solicitor
to assist Court --
- (1) In any proceedings under this Act (not being criminal proceedings) the Court may, if it thinks fit, appoint any barrister or solicitor of the Supreme Court to assist the Court in the proceedings.
- (2) Any barrister or solicitor so appointed may call any person as a witness in the proceedings, and may cross-examine witnesses called by any party to the proceedings.
- (3) The fees and expenses of any such barrister or solicitor shall be paid out of the Consolidated Revenue Account from money appropriated for the purpose by Parliament:
- Provided that, if the Court thinks proper, it may order any party to refund to the Crown such amount as the Court specifies in respect of those fees and expenses. That amount shall be recoverable as a debt due to the Crown."
455. Compare Recommendation 18(3), Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, text supra.
456. Mr. Justice Patrick Galligan, "Protection of Children in Family Disputes" (1973) 4 Can. Bar. J. (No. 2) 10.
457. Professor John B. Bradway, "Divorce Litigation and the Welfare of the Family" (1956) 9 Vanderbilt L. Rev. 665, at pp. 676-677.
458. Professor Henry H. Foster, Jr., "Conciliation and Counseling in the Courts in Family Law Cases" (1966) 41 N.Y. Univ. L. Rev. 353, at pp. 360 and 368-369.

For 1 valuable comments on the Wisconsin practice and experience, see Judge Robert W. Hansen, "Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests" (1964) 4 J. Family L. 181; "The Role and Rights of Children in Divorce Actions" (1966) 6 J. Family L. 1.

459. Judge Frank H. Myers, "Washington's New Domestic Relations Tribunal" (1956-1957) 6 Cath. L. Rev. 139, at p. 147.
460. Family Court Act, Hawaii, Act 232, S.L.H., 1965, section 333-23.5. Effective L. 1967, Act 76, section 6, the aforementioned section replaced section 324-38, R.L.H., 1955, as amended.
461. Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at pp. 1236-1237. Compare Judge William E. MacFaden and Meyer Elkin, "The Case for a Family Court: Progress or Chaos", Conciliation Courts Review, Vol. 6, No. 2, December, 1968, at p. 13:

"The Proposed Act carries with it the power to appoint a guardian ad litem for the minor children in certain cases. This is commendable and has proven to be of the inestimable value in Wisconsin."

See also footnote 458, supra.

462. (1967) 87 Sup. Ct. 1428. See text supra, at pp. 240-245.
463. (1967) 87 Sup. Ct. 1428, at pp. 1437-1438, cited in Royal Commission Inquiry Into Civil Rights, Ontario, 1969, Vol. 2, Ch. 40, Juvenile and Family Courts, at p. 596.
464. N.Y. Sess. Laws, 1962, ch. 686, as amended by N.Y. Sess. Laws, 1962, chs. 687, 700, 702, 703.
465. Ibid., section 248.
466. Jacob L. Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court" (1963) 12 Buffalo L. Rev. 501, at pp. 505-507.

See also Professor Monrad G. Paulsen, "The New York Family Court Act" (1963) 12 Buffalo L. Rev. 420, at pp. 433-434.

467. See Royal Commission Inquiry Into Civil Rights, Ontario 1969, Vol. 2, Ch. 40, Juvenile and Family Courts, at pp. 601-603, citing A.D. Samuels, New York Family Court Law and Practice (1964), pp. 30-31 and 304-306:

"The Act has created a new functionary known as the 'Law Guardian'. The law guardian is an attorney who is designated to represent minors in certain proceedings, including juvenile delinquency proceedings, to which the Act applies. The functions and purposes of the law guardians are

'...to assist the court, to insure against any invasion of civil rights or violations of constitutional privileges, and supply the Legislature and Governor with an independent view of the practical effect of the new Act. Through day to day contacts with other members of the Bar, law guardians will also serve a 'seeding' function. They will be in a position to inform colleagues of the practices and needs of the court.'

...The Act has established two categories of proceedings: the first is the 'fact-finding' hearing, sometimes called the 'adjudicatory' hearing; the second is known as the dispositional hearing.

A fact-finding hearing is held first. It is at this hearing that the court determines whether the allegations in the petition are sustained by a preponderance of evidence. At the beginning of this hearing the respondent child, and his parent or other legal custodian, must be advised of his right to remain silent and of his right to be represented either by counsel chosen by him or his parent or custodian, or by a law guardian appointed by the court. The Act further provides that the general public may be excluded from any hearing, with only those having a direct interest in the case being admitted. If the child is in custody, the fact-finding hearing must take place not more than three days after the filing of a petition.

After the fact-finding hearing has been concluded, the dispositional hearing may commence, assuming a finding of 'guilt' has been made. The dispositional hearing is 'a hearing to determine whether the respondent requires supervision, treatment or confinement'. Unlike the fact-finding hearing, in which the respondent's actions have been proven, its concern here is for the needs of the respondent. The proceedings are somewhat analogous to those in a criminal court in which the accused, who has been tried as to the allegations in the indictment or information, appears for judgement and sentence on the basis of the finding of his guilt. In the dispositional hearing before the judge, there is before him 'the formal finding which has been made after the fact-finding hearing,

the reports of the probation service, the whole file developed from the initial intake stage, and such testimony or evidence which may be produced, whether or not competent but necessarily material and relevant. Upon all this, the court makes final disposition.'

On the fact-finding hearing, the judge must be satisfied 'on a preponderance of the evidence'. The evidence that he receives, according to the Act, must be competent, material and relevant.

'Despite the expected and tolerated informality of a court which seeks to avoid the excessive stiffness and legalism of trials in criminal courts, it must none the less appear, by evidence presented in the usual manner and under the rules of evidence, that the child has committed the act alleged. At this point, the court cannot have before it investigation reports, which may be, and usually are, hearsay, or statements made in intake procedures, nor may it base its determination on an uncorroborated confession made out of court.'

The procedures applicable to the dispositional hearing pursuant to the Act are, however, quite different. At this point the facts have already been determined and the question becomes a social rather than a juridical one. At this stage the Act permits the judge to consult the whole file. He may hear witnesses, make investigations and consult records. While such evidence as he admits must still be relevant and material, the requirement of competency no longer holds."

See also Jacob L. Isaacs, "The Role of the Lawyer in Representing Minors in the New Family Court" (1963) 12 Buffalo L. Rev. 501, at pp. 511-518 and 520-521; Elloeen D. Oughterson, "Family Court Jurisdiction" (1963) 12 Buffalo L. Rev. 467, at pp. 470-471, infra, footnote 468.

468. Professor Monrad G. Paulsen, "The New York Family Court Act" (1963) 12 Buffalo L. Rev. 420, at p. 434. See also Elloe D. Oughterson, "Family Court Jurisdiction" (1963) 12 Buffalo L. Rev. 467, at pp. 470-471:

"There is a strong and new emphasis on the due process of law revealed in the legislation, which poses the inevitable dilemma in trying to fulfill the rehabilitative processes of the court. The role of the attorney as an officer of the court and representing the best interest of the client should necessarily be in accord with the court's purpose of giving aid and assistance to those persons who are in difficulty. Yet error, misinterpretation, failure of proof, violation of rights may well exist, so that the obligations of counsel extend to an adversary position not completely contemplated by the Legislature. The horns of the attorney's dilemma might be, on one side, the wishes and legal rights of the client, and on the other, his best interests and real need for help. It may pose for such legal representative the difficult, perhaps unethical problem of giving up certain rights for his client's own good, or permitting irreparable social and psychological harm to be done in the defense of due process.

A set of procedures have been developed in the most sensitive areas of the Family Court jurisdiction, which attempts to solve this aspect of the problem. Two hearings have been prescribed in matters of neglect, delinquency and family offenses: adjudicatory and dispositional. The court must determine whether it has jurisdiction over the respondent, on the basis of the allegations in the petition. If it determines that such person is rightfully before it and that the process of the court has been properly invoked, then the background of the case, the reports of probation service and other agencies, may be presented as an aid to the most effective disposition. This places the onus of justifying the bringing of the proceeding on the petitioner and does not permit the influencing of the court by information at that point of the case, extraneous to it. If the petitioner cannot sustain the allegations made, as a matter of due process the petition should be dismissed; it should allege facts, not conclusions, as an exercise of basic legal principle. Under these circumstances the attorney can give his client full support on the adjudicatory hearing and cooperate completely with the court on the dispositional.

For those persons without their own counsel, the statute not only permits the court to assign counsel, but it establishes a new program of legal aid: the law guardian. Whether he is to be a partisan representative in an adversary proceeding, or a friend of the court as it seeks the best interests of the respondent in those cases to which he is assigned, is still not clear. Legislative intent as expressed in the Committee's report and in part in the statute seems to indicate that it is the latter function, but several sections show a tendency to advocate a partisan approach. There may be occasions when the court should appoint a law guardian for a minor who has his own counsel, especially when it is provided by his parents with whom his interests may not be in accord."

469. Justine Wise Polier, Judge, New York State Family Court, A View From The Bench, N.C.C.D., 1964, at pp. 55-57. See also Elizabeth D. Dyson and Richard Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 58-60:

"The proper role of the lawyer in representing children has been the subject of some controversy. Some observers feel that the law guardian ought to play the part of pure advocate, insisting strictly on all rights and privileges available to a client no matter what the stage of a case. Others have suggested that the law guardian's function should extend beyond that of pure advocacy:

'The concept of "guardianship" would seem to require that not only the legal rights but the general welfare of the minor be thrown on the scale in the weighing by counsel of his course of action. The role of the "wise parent" has, in effect, been transferred from the court itself to the law guardian.'

Others have suggested that the lawyer act strictly as an advocate during the fact-finding phase of a hearing, insisting on all rights and privileges available to the client, but that the lawyer should cooperate completely with judges and social workers when it comes to disposition.

The law guardians in New York City have adopted the first of these views. From the beginning it has been office policy to insist on all available rights and privileges unless it seemed unwise for tactical

reasons, and to maintain complete independence of identification from the court. 'The Law Guardian in the Family Court,' writes one observer, 'is likely to be young, energetic and aggressive in his or her work. As lawyers defending a client, they identify with the child, and being trained in adversary proceedings, utilize legal techniques to the full.'

Judges found the presence of law guardians difficult to accept at first. Long used to the free-wheeling procedures of the old domestic relations court, many felt real hostility at being brought up short on procedural points. For example, when law guardians first started invoking the right to remain silent, some judges accused them of teaching children to lie. Indeed, the attorney in charge of the program still considers one of the most important qualities of the good law guardian to be the ability to stand up under judicial pressure.

Gradually most of the judges in New York City have come to appreciate the role of the law guardians at fact-finding hearings. But their function at dispositional hearings is sharply controversial. The law guardians, as noted, believe that they should play as active a role there as at the fact-finding hearings. They have compiled their own manual of agencies and institutions in order to question judges' choices or to make suggestions of their own. They have taken the position that their duty in delinquency cases is to keep children out of institutions at all costs. In selected cases they have hired their own psychologists to conduct independent examinations of children examined by the court's clinic. As 'counsel for the defense,' they believe they perform an important service to their clients by challenging the usual recommendations of probation officers and clinic staff.

A small minority of judges commends this kind of active participation in the dispositional process. But most judges and auxiliary personnel are less pleased with the law guardians' attempts to 'breathe in fresh air.' A psychiatrist observer wrote,

'The problems seem to arise at the dispositional process where some Law Guardians view any placement or correctional institution as an "incarceration" and will use many maneuvers

to frustrate an action deemed helpful to the child by the Probation Service or by the Judge....In the fact-finding hearings, in my opinion, this [adversary approach] is as it should be in order that the rule of presumption of innocence will fully prevail. However, the Act refers to the office as *Law Guardian*, not as "counsel for the defense" or as "public defender," and the word, guardian, implies a much broader role."

470. Justine Wise Polier, loc.cit., footnote 469, supra, at pp. 67-68.

471. Ontario Family Law Project, Vol. X, Family Court and Social Services, 1969, at pp. 249-251. See also Department of Justice, *Juvenile Delinquency in Canada*, Ottawa, 1965, at pp. 142-144, paras. 247-252:

"247. Our system of criminal justice assumes an ability on each side - that of the defence as well as of the Crown - to present its case as fully and as forcefully as possible. We have examined the need for a crown attorney in the juvenile court in the preceding paragraph. Our concern now is with the adequacy of the case presented for the child. The Act is generally silent on this matter. In the one place where it does speak it is in serious error. Section 31 provides: 'It is the duty of a probation officer to be present in court to represent the interests of the child when the case is heard....'. Experience has shown that one person should not be expected to perform inconsistent functions. The probation officer's primary responsibility is to the court, not to the child. In any event, the probation officer is, as we shall show, now so overburdened with work connected with his major responsibility that it is unlikely that he could properly represent the interests of the child. Nor can we expect the juvenile court judge, as a matter of routine, to represent the child's interests. As a general rule we do not expect judges of superior courts to perform this function. It is basic to our system of law that, in any proceeding where a person's liberty or property may be affected, the person is entitled to counsel. The great majority of children who appear in juvenile court are not represented by counsel. It is not clear whether this is because parents are unaware of the right of the child to have counsel, or cannot afford to retain counsel, or feel that they do not need or want legal assistance.

248. We think it important to take note of the fact that there has long been a feeling among many persons involved in juvenile court work that lawyers are unnecessary in the juvenile court, and perhaps even undesirable. As one writer has explained, 'since at the heart of the juvenile court movement was the vision of the court as a benevolent parent dealing with his erring child, the view was widely held that legal counsel could serve little function.....other than to obstruct and delay the providing of necessary diagnosis and treatment by pettifoggery and technical obstructionism.' This attitude has led a number of juvenile courts in the United States actively to discourage the presence of counsel. Parents have sometimes been told that hiring a lawyer is a needless expense and will make no difference in the ultimate outcome of the case. The Governor's Special Study Commission on Juvenile Justice in California concluded that 'the adverse views held by some judges regarding the role of an attorney in juvenile court proceedings makes it difficult for counsel to adequately represent their clients.' Lawyers, on their part, have often found juvenile court practice confusing and frustrating. Because of the tendency for the traditional adversary techniques of the lawyer to come into apparent conflict with the social objectives of the juvenile court process, suggestions have been made that practice in the juvenile court requires a new concept of proper legal representation. Italian law provides, for example, that the defence of a juvenile can only be undertaken by counsel selected from a panel of lawyers chosen on the basis of their special training and experience in social welfare work. This point will be the subject of further comment below. It is perhaps worth adding here, however, that attitudes towards the lawyer in juvenile court may well be changing. An article reporting on the 1962 revision of family court legislation in New York State contains the following observation: 'A significant...recent development has been the repudiation of the thinking that had discouraged the participation of lawyers in the "social" courts and the mounting demand for legal representation of children in these courts. Of particular interest is the fact that this demand has not originated with the bar but with various social agencies, which have concluded that juvenile and family courts can fulfill their expectations only if a proper balance of legal and social objectives is maintained.'

249. To what extent the attitude discussed above exists in Canada is difficult to assess. Certainly it was expressed to the Committee on a number of occasions. It does appear, in any event, that the procedure followed in many juvenile courts often has the effect of persuading parents to waive their right to counsel. The usual practice is for the judge to advise parents of this right when they appear in court. They are informed, however, that if they wish to have counsel it will be necessary to adjourn the hearing. Rather than risk added inconvenience or the loss of another day's work the parents declare to the court that the assistance of counsel is not required. We think that this result is unfortunate and that it can be avoided. We suggest that the notice to the parent informing him of his child's appearance in court should contain a statement that the child is entitled to be represented by counsel.

250. The problem of the indigent defendant is one that has not been solved in our legal system. The proposition that every person, regardless of his means, has the right to assistance of counsel is not borne out in practice. We share the opinion of those who say that failure to provide counsel to indigent defendants is a violation of basic human rights. In Canada there has been just such a failure. Legal aid schemes - not even adequate in relation to adult offenders - do not ordinarily extend to proceedings in juvenile court. We note that in a number of European countries free legal aid is available in juvenile court. Indeed, in three countries - France, Italy and the Netherlands - a juvenile must be represented by counsel. An impressive recent development is the establishment of a system of 'law guardians' in the State of New York pursuant to its new Family Court Act. The Act makes it the duty of the court to advise a juvenile of his right to retain counsel and of his right to have a law guardian provided at public expense if he is unable to obtain a lawyer 'by reason of inability to pay or other circumstances.' We recommend that the New York system be studied with a view to its introduction into Canada.

251. The 'law guardian' system may well be instructive in still another respect. It has often

been emphasized in the literature of the juvenile court movement that proper and effective representation in the court requires, at the very least, that the lawyer understand the objectives of the juvenile court process and be familiar with the social techniques employed in dealing with children and young persons. The Family Court Act makes no attempt to define the role of the law guardian. The consensus of commentators seems to be, however, that the use of the term 'law guardian' and the methods of appointment outlined in the Act indicate an intention on the part of the legislature to encourage the development of a distinctive approach to the matter of legal representation in the juvenile courts. ...

252. Because of the importance of the role of counsel in the juvenile court - and also because this is a matter that has been to some extent controversial - we have seen fit to quote extensively from periodical literature. In doing so our purpose has been to call attention to the problem. We make no specific suggestions concerning what is desirable in the way of an adequate concept of proper legal representation in Canadian juvenile courts. It does appear to us, however, that the question merits the study of the legal profession. We recommend, therefore, that any examination of the law guardian system in New York State be conducted with this further aspect of the problem of legal representation in mind."

For a summary of relevant recommendations, see ibid., at p. 291, paras. 51 and 52:

"50. The notice to a parent informing him of his child's appearance in court should contain a statement that the child is entitled to be represented by counsel (para. 249)

51. Study should be made, with a view to introduction in Canada, of a system of "law guardians", who could provide legal representation appropriate to the specialized nature of proceedings in the juvenile court. Under the system proposed, it would be the duty of the court to advise a juvenile of his right to retain counsel and of his right to have a law guardian provided at public expense if he is unable to obtain a lawyer (paras. 250, 251)."

For comments on the Federal Legal Aid Scheme introduced in 1973, which guarantees a qualified right to counsel in juvenile delinquency proceedings, see Lyle S. Fairbairn, "Comments on Federal Legal Aid

Proposals" (1973) 4 Can. Bar J. (No. 1) 8.

Compare Judge H.A. Allard, Family Courts in Canada, in Mendes Da Costa, Studies in Canadian Family Law, Ch. 1, at pp. 34-35:

"The supporters of a law guardian department suggest that children who are too immature to instruct a lawyer, or who do not have an understanding of their legal rights, would be protected by the law guardian. The task, as suggested by the New York State arrangement, would, in my view, place the law guardian in conflict with others who have the same statutory obligation of protection of the child; for example, the superintendent of child welfare or the director of corrections of a particular province. Again, we have an illustration of the conflict of roles between lawyer and social worker where the lawyer-law-guardian would be superimposing his position on other personnel who are officers of the court and who, by statute, are concerned about the general welfare and the legal rights of children and who are also concerned about helpful dispositions. How counsel can ethically 'promote in the child and its family an acceptance and understanding of the purposes of such a disposition' without venturing into well-established responsibilities or in compromising his position, it is difficult to perceive. The law guardian would appear to usurp somewhat the role of the judge, the probation officer and the child welfare worker and place himself in conflict with the residual rights of parents. The problem for children before the courts is not their right to an advocate, but is the failure of the state to provide a wide variety of adequate resources. Neither advocate nor law guardian can assure the general welfare of a child when there is this inadequacy; neither does he have the expertise in the social sciences to do the very things it is suggested that he should do aside from the role of advocate. As an advocate without instructions from his client, he invariably must make his own decisions as to what is in the best interests of his client, and in the case of children, rarely is this essentially a legal matter. A positive effect, however, would be that, in some courts, a law guardian would have greater status and acceptance than existing personnel because he is a lawyer. He might use his position in conjunction with other personnel to assist in the formation of very appropriate decisions on welfare

issues and of decisions which reflect the best interests of the child, decisions which might otherwise not be possible."

472. Ontario Family Law Project, Vol. X, Family Court and Social Services, 1969, at pp. 252-254.
473. In view of the maxim that 'justice must not only be done but must also be seen to be done', quare whether the child would consider that his interests had been adequately represented and protected if prosecution and defence counsel were both closely associated with the court wherein the disposition is made.
474. Compare Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, at p. 247, para. 246:

"246. ...[The] magistrate in adult court is ordinarily assisted by a legally trained crown attorney except in cases of a minor nature. In the juvenile court the usual practice is for a police officer, or in some courts a probation officer, to present the case against the child. If there is need for a crown attorney in a magistrate's court there is even more need for a crown attorney, or similar officer, in the juvenile court. Cases that are heard in the juvenile court are, in our view, as important as those heard in the ordinary courts. A finding of delinquency, with all the powers of disposition incidental thereto, is surely as significant, from the point of view of both the child and society, as is, for example, the trial and disposition of a speeding case against an adult. One argument that has been advanced in favour of retaining the present practice of police officers assuming the role of crown attorney is that police officers, at least when they have been specially selected for youth work, are less imbued with the spirit of winning. If the assumption of fact upon which this argument is based is true-although by this time one would have expected the maxim, 'The Crown never wins, the Crown never loses', to have been accepted by all crown attorneys - it merely emphasizes the need for strong juvenile court judges who can impress the philosophy of the Act on all persons involved in its operation."

And see ibid., p. 290, para. 49:

"49. There should be a crown attorney, or similar officer, in attendance in proceedings in the juvenile court (para 246)."

475. See Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at p. 97:

"Children facing possible incarceration ought to have counsel appointed automatically, since relatively few family court clients are sophisticated enough to appreciate the value of counsel, and too few family court representatives understand a lawyers' importance, or attempt to impart their understanding. Appointment of counsel, indeed, might well be made automatic in all children's cases, not just those involving potential institutionalization, since adjudication of any kind in a family court carries with it a stigma that may have serious, self-fulfilling consequences in a child's life."

Quaere, however, whether counsel should be automatically appointed at the intake stage. Elizabeth and Richard Dyson conclude (*ibid.*, footnote 20) that statutory provisions rendering statements made at intake inadmissible in fact-finding hearings constitute a sufficient protection from the self-incrimination dangers presented at the intake stage. But see text *supra*, at p. 382, where the writer endorses Recommendation 14(4) of the Alberta Working Paper.

Compare Quebec Working Paper, Recommendations 31-36, text *supra*, at pp. 364-365. See also U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at pp. 112-114:

"Attorney representation of children, parents, and other parties having an interest in juvenile court proceedings has received increasing recognition as an important and integral part of the juvenile court process. (See Right to Counsel, Chapter IV.)

The attorney who represents children and adults in juvenile and family court cases should, of course, be duly admitted to practice law in his State. Other qualifications include:

1. experience in trial advocacy;
2. knowledge of the goals, philosophy, and procedures of the juvenile court;
3. some appreciation of the rehabilitative concepts operative in juvenile court disposition (i.e., probation supervision, institutional care, etc.).

Unlike other positions discussed in this chapter, the attorney will not be a member of the court staff or administratively attached to the court structure. He may be furnished by another agency, e.g., legal aid office, defender agency, etc., but more likely will be selected by individual assignment from a panel or list maintained for such purposes. Ideally, some degree of specialization in juvenile and family court representation would help provide the most effective level of representation. This is achievable through both defender and legal aid officer services or privately retained counsel who have sufficient occasion to appear in court to obtain a substantial degree of familiarity and experience with its operation.

The attorney representing children and adults can play an active and constructive role at virtually all stages of proceedings:

1. At the pre-hearing stage, he can represent the child and his family at intake interviews, to help clarify whether jurisdictional requisites are met and there is sufficient evidence (i.e., a prima facie case) to warrant the filing of a formal petition. He can also present the family's position in detention hearings and determinations and explore possibilities of informal adjustment of the case, and the conditions thereof, without the necessity of formal petition and hearing.
2. At adjudication, he can insure observance of the child's and family's legal rights, present evidence and cross-examine witnesses, make objections to improper evidence and testimony, and see that the child's position is fully presented.
3. In disposition, the lawyer can present evidence bearing on the treatment decision, question facts developed in social reports, and serve as spokesman in presenting the child's and family's view of a proper disposition and any alternative plans they may wish to present for court consideration.

4. In post-hearing stages, the attorney can pursue appeals from any determinations deemed erroneous, represent the child in probation revocation proceedings or proceedings to change the terms of probation or otherwise alter the court's prior dispositions.

It is clear that succeeding years will evidence a marked increase in the incidence of attorney representation in children's courts. The process has already begun. It is incumbent on all concerned to assure that this role produces a positive contribution in terms of both advancement of the child's interests and rights and the overall quality and effectiveness of juvenile court justice. To this end, a responsibility for cooperation on the part of all concerned should be recognized, i.e., the sharing of information from the social study and diagnostic examinations used by the court in arriving at a disposition; orientation by court as to procedures and special characteristics of the jurisdiction; provision by professional organizations and law schools of training opportunities to develop competence in this area; and obligation of the attorney to fully acquaint himself with the specialized court and accommodate to the multiple roles inherent in juvenile court representation. The latter would include acceptance of additional responsibilities important to achievement of the court's goals (e.g., interpretation of court to children and parents, encouraging cooperation in disposition plans) without sacrifice of traditional lawyer obligations devolving upon counsel in any court representation situation (protection of rights, full development of facts, active presentation of client's contentions and position)."

And see U.S. Department of Health, Education and Welfare, Children's Bureau Publication 472-1969, Legislative Guides for Drafting Family and Juvenile Court Acts, sections 25, 26, and 41 and comments thereon:

"SECTION 25. Right to Counsel

(a) In delinquency and in need of supervision cases, a child and his parents, guardian, or custodian shall be advised by the court or its representative that the child shall be represented by counsel at all stages of the proceedings. If counsel is not retained for the child, or if it does not appear that counsel will be retained, counsel shall be appointed for the child.

(b) In neglect cases, the parents, guardian, or custodian shall be informed of their right to be represented by counsel and, upon request, counsel shall be appointed where the parties are unable, for financial reasons, to retain their own, or where, in the court's discretion, appointment of counsel is required in the interest of justice.

COMMENT

This section provides for a non-waiverable right to counsel in delinquency cases and in need of supervision cases. In order to expedite the administration of juvenile justice, it will be necessary to have counsel readily available. It is believed that the public defender system and the law guardian system as now operating in New York State are probably the most effective means of accomplishing this goal. In neglect cases, the State's attorney, by representing the State, which has a duty to protect the child, would also be representing the child. The court may also appoint a guardian or a guardian ad litem for the child under Section 41.

SECTION 26. Admissibility of Child's Preliminary Statements.

Unless advised by counsel, the statements of a child made while in custody to police or law enforcement officers or made to the [appropriate prosecuting official] or probation officer during the processing of the case, including statements made during a preliminary inquiry, predisposition study or consent decree, shall not be used against the child prior to a determination of the petition's allegations in a delinquency or need of supervision case or in a criminal proceeding prior to conviction.

COMMENT

This section is new. It goes beyond the *Miranda* decision in the sense that it does not permit a child to waive counsel and then make statements which could later be used against him. The section therefore is consistent theoretically with the non-waiverable right to counsel position adopted for family court hearings of delinquency and need of supervision cases. Statement made while a child is not in custody (e.g., 'threshold admissions') are not excluded. This section, of course, does not preclude a child and his counsel from entering into express agreements with court officials or others that statements of a child shall not later be used against him.

SECTION 41. Guardian Ad Litem--Guardian
of the Person.

(a) The court, at any stage of a proceeding under this Act, may appoint a guardian ad litem for a child who is a party to the proceedings, if he has no parents or guardian or custodian appearing on his behalf or their interests conflict with those of the child. A party to the proceeding or his employee or representative shall not be so appointed.

(b) The court, in any proceeding under this Act, shall appoint a guardian of the person for a child in any case where it finds that the child does not have a natural or adoptive parent in a position to exercise effective guardianship or a legally appointed guardian of his person. No officer or employee of a State or local public agency, or private agency or institution which is vested with legal custody of a child shall be appointed guardian of the person except when parental rights have been terminated and the agency or institution has been authorized to place the child for adoption. ...

COMMENT

In addition to authorizing the court to appoint a guardian ad litem, this section requires the court to appoint a guardian of the person if the court finds the child does not have a natural or adoptive parent in a position to exercise effective guardianship or a legally appointed guardian of his person. This requirement is based on the principle that every child is entitled to always have someone legally responsible for him.

No officer or employee of a State or local agency which has legal custody may be appointed as guardian of the person, except where parental rights have been terminated and the agency authorized to place for adoption. This limitation is included since the merging of legal custody and guardianship of a person in an agency would merge these duties in a single entity, thus depriving the child of a separate and independent advocate in the form of a guardian."

476. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 1 J. Family L. 1, at pp. 52-53.

477. See also Recommendation 17, especially para. 2:

"Recommendation #17

- (1) *That the court upon application of either party or on its own motion be empowered to direct the parties to appear before a court counsellor designated by the court for conciliation of matters incidental to proceedings for termination of marital status or other marital relief.*
- (2) *The parties should have a right to counsel in such conciliation proceedings."*

And see text supra, at pp. 336-337.

478. See text supra, at pp. 364-365. See also Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at pp. 13, 18-20, and 24:

"Certain procedural safeguards must be established for the protection of the rights of parents and children. Legal counsel should be available for all parties."

"If we recognize the principle that every person has a right to a fair trial, we must recognize that each person has the right to legal counsel. This right has been written into the Canadian Bill of Rights, Stas. Can. (1960), c. 44. In practice in Newfoundland, a person is only represented by legal counsel in Family Court if he can afford to pay for it. The Legal Aid Committee of the Newfoundland Law Society, in outlining cases which will be taken by Legal Aid, states:

'Where financial eligibility is established any civil matter will be undertaken except:
(1) Divorce and matrimonial causes including judicial separations, nullity, alimony actions, maintenance orders, alienation of affections, unless the applicant has been referred in writing by a qualified social worker, who must recommend such legal aid for the benefit of infant children, or the applicant has obtained a letter of recommendation from a

qualified medical practitioner indicating that the health of the applicant or his or her children may be endangered by the continuing matrimonial problems.

...

(10) Family Court matters.'"

"It seems that the Newfoundland Law Society will not provide Legal Aid to family courts. One should keep in mind that the lawyers give Legal Aid in Newfoundland without remuneration.

If legal rights are to be fully protected, some thought should be given to obtaining the services of lawyers by either

- a. having a lawyer available to family court as a law guardian, or
- b. having society pay lawyers to represent litigants in family court through the use of public funds."

"Every person appearing in family court should be entitled to legal counsel. Some thought should be given to the idea of making lawyers available to family court."

And see Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 43-44:

"Special Provisions Applicable in Adult Cases

Despite the restriction of New York's family court to civil cases only, certain actions such as paternity, neglect and family offense cases have a quasi-criminal flavor. At the very least, an adjudication of paternity, or of fault in a family offense case, carries with it a certain social stigma, even if a criminal record does not attach. Thus the legislators saw fit to extend some protections traditional in criminal cases: the court must advise adult defendants of the right to counsel in neglect, support, termination of parental rights and family offense cases, and the respondent in a paternity case cannot be compelled to testify against himself. On the other hand, the

ordinary criminal safeguard of trial by jury is specifically withdrawn in support and paternity cases.

The Standard Act and Hawaii avoid the necessity for choosing among applicable criminal protections, since they bestow criminal jurisdiction outright. 'The procedure and disposition applicable in the trial of such cases in a criminal court' is simply made 'applicable to trial in the family court.' Similarly where Rhode Island's court is given criminal jurisdiction, the right to trial by jury applies and such trials 'shall be held in the same manner and subject to the same provisions as jury trials in criminal prosecutions in the superior court.'"

479. The inadequacy of the legal aid scheme in Alberta in providing legal representation for divorce litigants in the low economic group is documented in unpublished materials prepared by law students registered in this writers seminar on The Cost of Divorce (Alberta, 1972). The conclusions expressed or implicit in this study are re-enforced by correspondence submitted by individuals to the Family Law Project. The emergence of commercial and non-commercial "Do It Yourself Divorce Kits" and the current involvement of Student Legal Aid Clinics in assisting divorce litigants also signify the failure of provincial legal aid schemes to secure adequate legal representation for divorce litigants.
480. For comments on the interest of the Federal Government in promoting new and more efficient techniques to ensure legal representation in civil proceedings, see Lyle S. Fairbairn, "Comments on Federal Legal Aid Proposals" (1973) 4 Can. Bar. J. (No. 1) 8, at p. 9.
481. See text supra, at pp. 142-143.
482. See text infra.
483. Judge H.A. Allard, Family Courts in Canada, in Mendes Da Costa, Studies in Canadian Family Law, Ch. 1, at p. 35. And see Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J.Family L. 505, at pp. 562 and 564:

"What kinds of services might be appropriate in a family court, besides probation officers, marriage counselors, and psychiatric personnel? As evidenced by the judges' direct appointments, informal arrangements for services, and expressed wishes, more help is needed in two major areas: legal services for judges and intake workers, and collection of money for support.

Legal services may be useful to a family court in a number of ways. Overworked judges may need help in researching legal issues arising in a case. In doubtful cases, intake workers may need legal advice on such questions as whether certain facts constitute probable jurisdiction or whether the evidence seems sufficient to establish that an act was committed. A lawyer may be necessary to prepare and present the case against a respondent, especially if the respondent is represented by counsel. (This last role for a court attorney is so vital that it has been reserved for separate discussion in connection with hearing procedure.) But family courts are just beginning to conceive the lawyers as part of their necessary staff. ...

A second major area where supplementary staff can be useful is in the collection of support money. Probation officers may be used for that task, as is provided by rule of court pursuant to the [New York] Family Court Act. But some observers feel that the role of probation officers as mere 'collection agents' should be down-played, and that their primary function should be adjusting and counseling cases. Thus some courts have sought to create new positions for help in collecting money owed for support.

The New York City Office of Probation has established a new category of employee altogether, 'fiscal officers,' to relieve probation officers of the ministerial aspects of enforcing orders of support. Fiscal officers need only have a high school education and three years of investigating experience, or a college degree. Their function is to service cases of failure to comply with support orders and entertain applications for modification of the amount of support. If problems of visitation, neglect or abuse arise in the course of processing such cases, fiscal officers are instructed to channel such cases to the probation officers..."

484. See Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, Recommendation 19:

"RECOMMENDATION #19

- (1) THAT LAWYERS SHOULD BE AVAILABLE TO ACT AS COUNSEL FOR THE COURT ON ALIMONY, MAINTENANCE AND CUSTODY APPLICATIONS.
- (2) THAT IF COURT COUNSELLORS PERFORM THIS FUNCTION IN THE ABSENCE OF LAWYERS, THEY SHOULD NOT HAVE HAD PREVIOUS CONTACT WITH THE MATTER."

See Civil Code Revision Office, Working Paper on the Establishment of a Family Court in Quebec, January, 1973, Recommendation 36:

"RECOMMENDATION #36:

THE COMMITTEE RECOMMENDS THAT ADVOCATES BE ATTACHED TO THE FAMILY AND CHILD COURT TO WORK AS CROWN PROSECUTORS OR AS LEGAL ADVISERS TO THE INTAKE SERVICE."

485. See text supra, at pp. 342-345.

486. Quaere whether it is possible or desirable to differentiate between proceedings wherein the rights of and obligations of the respective parties are in issue and require adjudication (e.g. on an application for maintenance), and proceedings wherein enforcement of established rights is sought (e.g. on default arising under a prior maintenance order.) It might be contended that the current high rate of default with respect to maintenance orders exemplifies the inadequacy of the present law that imposes the initiative on the individual spouse to secure due enforcement of the rights and obligations previously determined and that the State, through officers of the Family Court, should assume a more substantial responsibility and active role in the pursuit and prosecution of defaulters.

Quaere also whether the Department of Legal Services should assume the responsibility for representing litigants in uncontested proceedings (excepting custody), if legal aid is otherwise unavailable.

487. Judge H.A. Allard, Family Courts in Canada, in Mendes Da Costa, Studies in Canadian Family Law, Ch. 1, at pp. 20-21.
488. See Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at p. 96

"Law clerks should be supplied for judges, both in order to save judicial time and so that family court decisions will have firmer foundations in existing decisional law from within and without the jurisdiction."

See also P.J.E. Cole, "Family Courts -- Their Nature and Function" (1971) 4 Man. L.J. 317, at p. 337:

"Other required auxiliary personnel include law clerks for the judges, prosecutors attached to the court and enforcement officers for the collection of support money."

489. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 23-30 and 35-36.
490. See text supra, at pp. 327-332.
491. See, e.g., text supra, at pp. 327-332 (Alberta Working Paper); and 361-362 (Quebec Working Paper).
492. See Juvenile Delinquents Act, R.S.C., 1970, ch. J-3, section 31:
- "31. It is the duty of a probation officer
- (a) to make such investigation as may be required by the court;
- (b) to be present in court in order to represent the interests of the child when the case is heard;
- (c) to furnish to the court such information and assistance as may be required; and
- (d) to take such charge of any child, before or after trial, as may be directed by the court."
493. U.S. Department of Labor, Children's Bureau Publication 193, The Child, The Family, and The Court, Washington, 1929, at pp. 57-58.
- See also text to footnote 498, infra.
494. For a summary of definitions, guidelines and conciliation provisions in "breakdown" statutes enacted in the United States, see Professor Henry H. Foster, Jr., "Divorce Reform and The Uniform Act" (1973) 7 Fam. L.Q. 179, at pp. 203-210.
495. See text to footnote 74, at p.75, supra.
496. Compare Commission on Children and Youth, State of Hawaii, Report No. 29, A Study of Law Affecting Family Life and Youth, November, 1964, at pp. 4-5:

"Subject: Support Order (Enforcement)

#5. Recommendation: PROVIDE WITHIN THE COURT, BY STATUTE OR RULE, COURT MACHINERY TO ARRIVE AT A FAIR DETERMINATION OF SUPPORT ORDERS; TO ENFORCE SUCH ORDERS AND TO MAKE ADJUSTMENTS AS NECESSARY.

Justification: Support is an item of serious concern in divorce since it affects children. The Committee, which included representatives of State and private welfare agencies, clergymen, juvenile and family court advisors and attorneys reported unanimously that support orders after divorce were often exceedingly difficult to enforce under present adversary procedures. It is necessary for the wife to retain an attorney on her own initiative to compel compliance. It is oftentimes difficult for her to have a real investigation of the former husband's financial situation and to disprove the former husband's statement even though the wife and her attorney have good reason to believe the testimony to be false. Furthermore, the judges are reluctant to impose the sanctions for noncompliance — ordinarily a fine for contempt or occasionally a jail sentence — for humanitarian reasons as well as for the obvious reason that imposing a fine or jailing the delinquent spouse usually merely aggravates his inability to pay the support already ordered.

The Committee discussed various possibilities, the most likely being the granting of authority to the Court to refer the matter to a duly designated officer of the Court for investigation and recommendations. After the formal support order has been issued by the Court, regular follow-up may be instituted by the officer with delegated authority to make such later adjustments as deemed necessary and just, thus avoiding constant recourse to formal Order to Show Cause by the complainant.

Such provision is now made by rule in Los Angeles where the Probation Officer is designated ex-officio Court Trustee with the responsibility and authority for enforcing support orders."

See also U.S. Department of Health, Education and Welfare, Children's Bureau Publication, 437-1966, Standards for Juvenile and Family Courts, at p. 68, infra, footnote 506.

And see Peters v. Peters [1971] 2 O.R. 246; Bean v Bean [1972] 2 O.R. 23.

497. Compare S.H. Hofstadter and S.R. Levittan, "Alimony - A Reformulation" (1967) 7 J. Family L. 51, wherein it is proposed that sworn information should be submitted by husband and wife on a standard form questionnaire detailing information relating to such matters as earnings, assets, expenses, and debts. Compare the requirements of the current Divorce Rules operating in the Canadian provinces.

See also Maxime B. Virtue, Family Cases In Court, at pp. 27-28:

"By the use of a simple questionnaire, the domestic relations investigators, a commissioner, or even a clerk if properly supervised, could establish the firm facts upon which financial orders need to be based, with a saving of considerable judicial time for matters more worthy of the judge's talents. Such a questionnaire is said to be in use on an experimental basis in a county adjoining San Francisco, but was not directly observed. An alternative method of accomplishing the same result, it has been suggested, is to improve the attorneys' preparation practices, which appear to be less than thorough in some cases. According to one judge, the small fees commanded in domestic relations practice do not conduce to the thorough preparation of these cases. Perhaps the legal aid movement will in time solve this problem. Another alternative is the use of a pretrial hearing to establish the availability of adequate factual data before proceeding in the courtroom."

498. Commission on Children and Youth, State of Hawaii, Report No. 28, A Proposal for the Establishment of a Family Court in the First Circuit of Hawaii, July, 1964, at p. 4. See also ibid, at p. 8:

"A thorough social investigation prior to adjudication and a limited follow-up program after a decision are seen as functions of inestimable value to the court not only in terms of certain divorce actions per se, but also with respect to determination of child custody, visitation, support and alimony payments."

And see Commission on Children and Youth, State of Hawaii, Report No. 29, A Study of Laws Affecting Family Life and Youth, November, 1964, at pp. 4-5:

"Subject: Custody of Children (Investigation)

#4 Recommendation: THAT STATUTORY PROVISION BE MADE FOR THE COURT TO INVESTIGATE MATTERS RELATING TO THE CUSTODY OF MINOR CHILDREN IN DIVORCE CASES PRIOR TO THE AWARDING OF CUSTODY.

Justification: The lack of statutory provision enabling court investigation of matters relating to the custody of children in divorce cases before custody is actually awarded represented an area of concern to the Committee. There was unanimous agreement to call for remedial action requiring such an investigation by law.

Under existing practice, custody of children is usually awarded either through contested testimony of parents and other witnesses, or by agreement through negotiation between lawyers, and parents' needs and wishes are often met while the needs and wishes of minor children are ignored. Consequently, children become pawns in custody conflicts between parents and the end result is often detrimental to their welfare. Pre-custody investigation can now be made only by agreement between parents.

In adopting this recommendation, the Committee fully endorsed the concept of the family court, in which an investigation by its staff prior to awarding custody is an integral part of its operation. Until the family court materializes, such an investigation can be conducted by the Adult Probation Division, which is currently undertaking the responsibility where parties agree to it.

There are several judges familiar with custody problems who feel that such an investigation should be made mandatory in all cases where custody must be awarded."

See also text to footnote 456, especially at pp. 477-480, supra.

499. Family Court Act, Hawaii, Act 232, S.L.H., 1965, as amended by Act 76, 1967. See also ibid, section 333-19:

"In the disposition part of the hearing any relevant and material information, including that contained in a written report, study or examination, shall be admissible, and may be relied upon to the extent of its probative value; provided, that the maker of such a written report, study or examination shall be subject to both direct and cross-examination upon demand and when he is reasonably available. The disposition shall be based only upon the admitted evidence, and findings adverse to the minor as to disputed issues of fact shall be based upon a preponderance of such evidence."

500. Report of The Governor's Commission on the Family California, 1966, at pp. 40-42. See now C.C. 4602:

"CC 4602. Custody Investigation — Confidential Report. In any proceeding under this part, when so directed by the court, the probation officer or domestic relations investigator shall conduct a custody investigation and file a written confidential report thereon. The report may be considered by the court and shall be made available only to the parties or their attorneys at least 10 days before any hearing regarding the custody of a child. The report may be received in evidence upon stipulation of all interested parties."

501. See P. Webb, "The Domestic Proceedings Act, 1968 — The First Two Main Objectives" [1969] N.Z.L.R. 700.

As to the power of the court to call witnesses of its own motion and to appoint counsel to assist the court, see Domestic Proceedings Act (New Zealand), 1968, sections 9 and 10:

"9. Court may call witnesses—(1) In any proceedings under this Act (not being criminal proceedings), the Court may of its own motion call as a witness any person whose evidence may in its opinion be of assistance to the Court.

(2) The power conferred by subsection (1) of this section shall include power to call as a witness any party to the proceedings or the wife or husband of any party to the proceedings.

(3) Any witness called by the Court under this Act shall have the same privilege to refuse to answer any question as he would have if he had been called by a party to the proceedings.

(4) Any witness called by the Court under this Act may be examined and re-examined by the Court or by any solicitor or counsel assisting the Court, and may be cross-examined by any party to the proceedings.

(5) Sections 20, 38, and 39 of the Summary Proceedings Act 1957, as far as they are applicable and with the necessary modifications, shall apply with respect to every person called as a witness by the Court under this Act as if he had been called by a party to the proceedings.

(6) The expenses of any witness called by the Court under this Act, in accordance with the prescribed scale of witnesses' expenses, shall be paid in the first instance out of the Consolidated Revenue Account from money appropriated by Parliament.

10. Appointment of counsel or solicitor to assist Court— (1) In any proceedings under this Act (not being criminal proceedings) the Court may, if it thinks fit, appoint any barrister or solicitor of the Supreme Court to assist the Court in the proceedings."

502. Cmd. 9678 (1956), paras. 372-374, 383 and 385.

The proposal of the Royal Commission on Marriage and Divorce (see text, para. 373) was legislatively implemented by section 2 of the Matrimonial Proceedings (Children) Act (England), 1958. This section was subsequently superseded by section 33 of the Matrimonial Causes Act (England), 1965, and the current statutory provisions are set out in section 17 of the Matrimonial Proceedings and Property Act (England), 1970. Compare Divorce Act, R.S.C., 1970, ch. D-8, section 9 (1)(e). For valuable comments on the English legislation, see Law Commission, Working Paper No. 15, Arrangements for the Care and Upbringing of Children (Report by Mr. John Hall, St. John's College, Cambridge), February 6, 1968.

503. Judge Roger A. Pfaff, "The Role of the Social Worker" (1964) 50 A.B.A.J. 565, at p. 566.

Compare Annual Report, 1971, The Conciliation Court, Maricopa County, Arizona, at pp. 6-7:

"Motivated by a concern as to what is best for a child or children, the Courts may request a custody investigation. In this investigation, efforts are made to secure information for the Court relative to the conditions of both physical and emotional environment of the children. The purpose is to provide factual data that will help the Court make a decision as to custody which will be in the best interest of the child or children. Custody-visitation investigations do not have an adhered-to-format, except that all are investigated only upon receipt of a minute entry from the referring Court. Also, all principals are seen in two-hour interviews in the Conciliation Court. From there, procedure depends upon the allegations of the parties and the ages of the children. If the children are of a verbal, reasoning age, they, too, are seen in interviews. If they are of school age, routinely the school is contacted regarding their development and parental involvement. If there are psychiatrists, psychologists and/or medical doctors involved, they are contacted as well as people in the community who have 'observed' knowledge of the children's situation. If the state of the home is questioned, a home visit is made to evaluate that. Each case, therefore, proceeds according to information gleaned from the principals. It cannot be stressed too much that the whole process by the Court is geared to making a decision as to what is best for the child or children in an already distressing situation. After the information is gathered, it is evaluated and a report with a recommendation which may, or may not, be followed is respectfully submitted to the Court at the conclusion of each investigation."

504. See text to and contents of footnote 467, supra and contents of footnote 468, supra.
505. The Challenge of Crime in a Free Society, February, 1967, cited in Report of Royal Commission Inquiry Into Civil Rights, Ontario, 1969, Vol. 2, Ch. 40, Juvenile and Family Courts, at p. 600.

506. Ibid., at pp. 600-601. Compare U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at pp. 13-14:

"Making the social study. A social study is made for the specific purpose of helping the court determine what disposition to make. Such study is made after a preliminary review, at intake, provided that the facts appear to establish prima facie jurisdiction and there is either a voluntary admission by the child, or the court has made a finding as to the allegations in the instance of a denial by the child. The court's determination will, of course, be based upon all relevant facts presented to it. Whether presented as a result of the social study or outside of such a study, through other testimony presented in court. The cardinal principle here is that the court should have before it all the facts necessary to make an intelligent decision. The availability of a social study is considered necessary to the judicial function. Therefore, where a statewide court is established (see Chapter III, Organization and Jurisdiction), it is preferred that personnel making the social study be administratively attached to the court. This service, however, is often provided by an administrative agency. When available it should be utilized by the court. In such situations, personnel providing this service should be accountable to the court for the study. In other than neglect and delinquency cases, this may or may not be so. When another agency, staffed to make social studies has initiated the petition, such agency might well provide this service."

And see ibid., at pp. 65-68:

" The social study is an extremely important part of the court's procedure. On the basis of the social study and other facts presented at the hearing, the court, *having first made a finding regarding the facts alleged in the petition*, makes appropriate disposition and determines what rights of the parent or the child may need to be limited. The social study may also include facts that are not relevant to disposition but important to a probation officer or agency working with a child after adjudication.

The social study should never be confused with the evidence necessary to substantiate the facts alleged in the petition. In some cases— notably those of neglect where the petition is filed by a protective agency—the facts to substantiate the petition and the facts to support recommendations for disposition may have been gathered by the same agency and may deal substantially with the same factors. The study process involves evaluation and the study itself will include opinion as well as facts. There are always factors in a neglect case which have no bearing on the question of whether or not neglect exists but which may be of importance to the court in making disposition or for further handling of the case by a protective or foster care agency.

A social study should begin after the preliminary inquiry by intake staff and the filing of the petition. Exception to this occurs when a child denies the allegation in the petition or when the intake worker or probation officer assigned to study the case has reasonable doubt that the child was in fact involved. In such cases, a court hearing should be held to determine whether or not he committed the act alleged and the social study should not be begun until this has been determined. A social study made by the court inevitably involves some invasion of privacy, including contacts with schools and other courts or agencies and might result in some unwarranted discussions about the child and his family. Furthermore, time and effort invested in making the social study would be wasted if the court later finds that the child was not involved in the delinquent act.

Responsibility for the social study should lie with the probation officer or a worker in another agency who is administratively responsible to the court for this service. An exception to this may be where the law gives authority to another agency to make a report. Where the petition is filed by an agency already working with the family, the agency may actually conduct the study and report its findings to the probation officer. The court, however, should have authority either to require that certain additional information be obtained, or to supplement the study by its own investigation. Medical, psychological, or psychiatric findings should be channeled to the probation officer for inclusion in the study.

The probation officer needs all available material in order to make recommendations in a case.

The actual content of the study will depend on the type of case and the issue before the Court, and will be different, for instance, in adoption cases (where its general content is sometimes prescribed in the statute), cases of disputed *legal custody*, applications for *guardianship of the person*, cases of delinquent behavior, and cases of neglect.

Referral of the child for medical examination or to a psychologist or to a psychiatrist, or both, should be made on a selective basis. The probation officer or agency conducting the study for the court should have the right—acting under the authority of the court—to require physical, mental, or psychiatric studies of a child on whose behalf a petition has been filed. This should not be done in delinquency cases where the child has denied the alleged delinquency except when consent is given or when the issue of the child's capacity to stand trial is raised as a defense. The power to require such examination, however, should not apply to the examination of a parent, or another adult, without his consent, if he is not before the court on a charge or formal complaint.

The probation department or in a statewide system, the state director of court services should develop outlines for social studies in the different categories of cases. These outlines are important in providing comparable information on comparable cases. In general a study covers the personal history of the child and his family, the child's social, emotional, mental and physical development and his environment, including his home, school, church, and community influences. Especially important is an understanding of the child's relationship to other members of the family and to others with whom he comes in close contact.

The social study, however, entails more than just securing a mass of facts and clinical reports regarding the child and his family. It requires evaluation and interpretation of these facts in relation to the situation facing the child and his family. The purpose of the social study is to determine the care or treatment needed—not to

prove or disprove that a delinquent act has been committed. Therefore, the child's attitudes about the delinquent act in question are pertinent to the social study since they may indicate the nature of the treatment required.

The social study may be compiled from a number of sources: the child and his family, medical, psychological or psychiatric reports, and records of social agencies and other courts, reports based on observation of the child while in detention, and the opinions of school-teachers, the police and others. Through this process recommendations for disposition and a treatment plan are developed.

The court needs to have certain facts and social information available to it when making orders for support. Such information may differ somewhat from that secured in cases of neglect and delinquency. Information relating to the care, supervision, and adjustment of the child, health problems in the family, previous marital alliances, family relationships, financial situation including place and hours of employment, income, debts and other liabilities, present living arrangements and the events leading to the failure to support are some of the factors which may need to be considered by the court in making an order for support. These are also factors which may determine whether placing an adult charged with nonsupport on probation is necessary, or in the case of civil proceedings, whether a referral to another agency for casework services seems desirable.

Social studies will also be used in relation to domestic relations actions within the jurisdiction of a family court. The content, the purpose, and the point at which they are used in process are essentially similar to that in cases of delinquency and neglect. For example, in divorce proceedings the study would be used after a determination is made as to the divorce to help the court determine ancillary issues such as custody, support, or visitation. They may also be used when similar determinations have to be made after a finding in a paternity proceeding. In criminal actions, they would be used after conviction in the form of a presentence investigation.

As pointed out earlier, the concept of individualized justice requires individualizing the child and his situation through court dispositions based

upon the best available knowledge of the needs of the child. Therefore, the making of a social study prior to disposition in certain types of cases and subsequent use by the court should be made a mandatory part of specialized court procedure, either by rule of court or statutory requirement.

As in the case of the preliminary study, failure to conform to this requirement should be grounds for reversal on appeal."

507. Report of The Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, at pp. 150-151, para. 265. On the correlative question of informal adjustment on intake, see ibid., pp. 152-153:

"269. We think that, on balance, the advantage lies with permitting informal adjustment to a limited degree, but subject to precise legal controls. As the Probation Officers' Association of Ontario has observed, 'a substantial proportion of all juvenile complaints - at least in certain areas - are now dealt with informally in this manner, but completely without statutory authorization or direction.' It is evident, therefore, that such non-judicial practices should not be ignored. It seems to us to be the wise plan to regularize non-judicial practices - stipulating, in the process, that they must meet certain defined standards of performance - rather than to attempt to terminate informal adjustment by express legislative prohibition. We note that this is the solution that has been adopted in the new Family Court Act of New York which, as one author states, 'is unique in the fact that not only does it make provision in a general way for preliminary procedure or intake but it describes in considerable detail the procedural requirements that must be observed.' Specifically, the New York statute provides that rules of court may authorize the probation service to undertake preliminary procedures, subject to the safeguard that 'the probation service may not prevent any person who wishes to file a petition...from having access to the court for that purpose.' The statute also indicates that the probation service may not compel any person to appear at a conference, produce any papers or visit any place. It seems to us that an approach along these lines represents an acceptable solution to the problems presented by informal adjustment. We suggest that the law should provide that informal adjustment is permitted only where the police investigation indicates clearly that an offence has been committed, where the substance of the complaint is

admitted by the child, and where the express consent of the parents is obtained. We also recommend that efforts to effect informal adjustment should be limited by law to a period of not more than two months."

508. Ibid., at pp. 164-165, paras. 278-280.

509. Ibid., para. 279, cited in text supra.

510. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 73-75.

See also Professor Henry H. Foster, Jr., "Conciliation and Counseling in the Courts in Family Law Cases" (1966) 41 N.Y. Univ. L. Rev. 353, at pp. 356-357:

"The initial step in the Toledo divorce procedure is the delivery of a copy of the divorce petition to the court administrator, who has immediate jurisdiction over the staff, but is subject to the authority of the judge. The parties are *invited* to avail themselves of the free counseling service, and a complete investigation of the family is made for eventual use by the court. Investigation reports are admissible at trial on the condition that they are made available to counsel and interested parties five days in advance of the hearing and that the reporter is produced upon demand for cross-examination. This permits the introduction of useful information and at the same time it accords an opportunity for rebuttal or refutation. These reports contain a description of the home, the religious affiliation, the health and physical condition of the children, and their record of school attendance and behavior."

And see Professor Henry H. Foster, Jr. and Doris Jonas Freed, "Child Custody" (1964) 39 N.Y. Univ. L. Rev. 615, at pp. 617-618 and 620-622:

"It would seem possible to accommodate both the need for adequate information and the strictures of the hearsay rule if due regard is given the policies underlying the numerous exceptions to the hearsay rule and the special circumstances presented by custody cases. On the one hand, there is a genuine need for expert information, evaluations, and reports;

on the other, there is justifiable aversion to secret evidence. ...

It would seem that the general rule against the use of secret reports is sound. Custody disputes so often involve hotly disputed fact situations and evaluations of character that both fairness and logic call for a ban on secret evidence. Nevertheless, it has been argued that nondisclosure is necessary to conceal informants' identity so as to secure their cooperation for background investigations. Moreover, needless delay may result if the author of the report is made available for cross-examination, and if the defendant is accorded an opportunity to rebut the report. Such arguments should be rejected, and reports admitted only when they are not secret.

The case is otherwise with non-secret hearsay reports; they should be admitted. ...

The sound approach, in view of the purposes behind the hearsay rule and the real need for investigations and reports, is that followed in Ohio, and some other states. In such jurisdictions, reports of the probation department and of court-appointed psychiatrists may be received into evidence and made part of the official record without stipulation. Copies of the reports are given to the parties in advance of the trial and, upon request, their authors are made available for examination and cross-examination. Thus a compromise is reached. Secret reports are not admissible, but inaccuracy in other hearsay reports may be exposed, and mistaken judgments refuted. Other progressive solutions have been achieved in New Jersey and in the Model Code of Evidence. New Jersey, in its rules of court, provides for an investigation before an award of custody, for periodic reports thereafter, and for the filing of these reports and their reception as direct evidence subject to the right of cross-examination. The Model Code of Evidence, in Rule 403(b), provides that the court may appoint its own expert witness. Rule 404 provides that a party may call an expert witness if the judge finds that such party has given reasonable notice to each adverse party, or that it is expedient to have such a witness even though no notice has been given. Comparable provisions are also found in the Uniform Expert Testimony Act. It should be noted that many

courts recognize social workers as experts in family relations and that appellate courts on occasion have remanded cases involving conflicting testimony in order to secure social workers' advice. ...

It seems probable that most states eventually will effect a compromise by allowing the introduction of case workers' reports, while insisting upon an opportunity to test, explain and rebut such material. To some judges even this concession may appear to be an abdication of judicial responsibility or a denial of due process. But the need for expert assistance in custody cases is so great that, as courts acquire expert personnel, the introduction and use of reports will become routine and objections will be infrequent. At the same time, however, due to the essential unfairness to the parties and the adversary character of custody proceedings as compared with juvenile-court cases, courts utilizing such investigations and reports must be structured so that secret evidence is not made a basis for decision. Competing interests of parents, as well as the best interests of the child, are at stake in custody proceedings; thus they are, to an extent, adversary and should be treated as such."

See also Judge Paul W. Alexander, "Family Cases Are Different — Why Not Family Court?" (1954) 3 Kansas L. Rev. 26, at pp. 31-35; H.L. Goldberg and W.H. Sheridan, "Family Courts — An Urgent Need" (1959) 8 J. Pub. L. 537.

For comments on the use of investigative reports in juvenile proceedings, see Professor Chester J. Antieau, "Constitutional Rights in Juvenile Courts" (1961) 46 Cornell L.Q. 387, at pp. 401-403; Professor Monrad G. Paulsen, "The Juvenile Court and the Whole of the Law" (1965) 11 Wayne L. Rev. 597, at pp. 609-610. And see U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at pp. 73-74:

"Once the court has established the facts alleged in the petition, the second part of the hearing relating to disposition begins. Prior to this point it is not necessary to use the social study in the proceedings. In fact, in contested cases its use should be prohibited. This applies not only to reading the study but also to 'bench conferences'

with the probation officer, or with social agency staff or the petitioner or his counsel.

In the disposition hearing, however, all relevant information whatever its nature should be admitted. It is at this point the probation officer presents the salient facts disclosed by the social study. A summary report is desirable in that it makes the inclusion of the entire social study in the legal record unnecessary. Whether the probation officer makes his recommendations at this time depends on the judge. Some judges prefer to call for recommendations after discussing the report with the child or family. Others call for them only when they have doubts as to the appropriate disposition. In any event, the probation officer should always be prepared to make recommendations.

Some judges prefer that the probation officer's summary and recommendations be made in written form while others prefer an oral report. An oral presentation is preferable in that the judge does not have to spend time reading the report. It also readily acquaints the parties with the facts and opinions upon which disposition is based. The judge, however, should have the complete study before him for ready reference. Regardless of the method followed, the facts presented --either orally or written--upon which the court relies, should be open to rebuttal by the child, his family, or their counsel, and witnesses may be introduced to rebut them. This does not mean that the entire social study (which may contain other facts, confidential in nature and not relevant to disposition), should be available to the child, parent, guardian, or counsel. However, that information in the record referred to by the judge or incorporated in the summary report upon which the court relies in making disposition should be made known to the child, parent, guardian, or counsel. Probation officers or persons who have presented reports should be subject to cross-examination and required to present the facts upon which their recommendations are based. *No judicial decision should be based upon an undisclosed fact.*

At stake in this second part of a hearing are the rights of the child to remain at liberty without interference by the State and the rights of the parents to legal custody of the child. Due process of law, therefore, is equally applicable to this part of the hearing."

For relevant legislation in the State of Hawaii, see text to and contents of footnote 499, supra.

511. Richard C. Dinkelspiel and Aidan R. Gough, "A Case for a Family Court -- A Summary of the Report of the California Governor's Commission on the Family" (1967) 1 Fam. L.Q. 70, at pp. 75-76.
512. Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at pp. 1237-1238. See C.C. 4602:
- "C.C.4602. Custody Investigation -- Confidential Report. In any proceeding under this part, when so directed by the court, the probation officer or domestic relations investigator shall conduct a custody investigation and file a written confidential report thereon. The report may be considered by the court and shall be made available only to the parties or their attorneys at least 10 days before any hearing regarding the custody of a child. The report may be received in evidence upon stipulation of all interested parties."
513. Elloeen D. Oughterson, "Family Court Jurisdiction" (1963) 12 Buffalo L. Rev. 467, at pp. 471-472. See New York Family Court Act, 1962, §§ 347, 435, 625, 746, 835 and 915. See also Kessler v Kessler 10 N.Y. 2d 445, 180 N.E. 2d 402, 225 N.Y.S. 2d 1, wherein the philosophy of confidentiality of reports is discussed.
514. Professor Monrad G. Paulsen, "The New York Family Court Act" (1963) 12 Buffalo L. Rev. 420, at p. 435. For criticisms of the New York legislation, see Elizabeth and Richard Dyson, loc. cit., footnote 510, supra.
515. Dr. Olive M. Stone, "The Importance of Children in Family Law" (1967) 6 Western L. Rev. 21, at pp. 24-25.
516. Civil Code Revision Office, Working Paper on the Establishment of a Family Court in Quebec, January, 1973.
517. Institute of Law Research and Reform, Province of Alberta, Working

Paper, Family Court, April, 1972. See also Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at pp. 9-10:

"In any event parties concerned and their counsel should have an opportunity to see in advance the reports of court personnel so that there may be a refutation of any errors or inaccuracies. There are two important values at stake here - on the one hand, a family court, to be effective, needs the information made available by reports and investigations, and on the other hand, to insure fairness and to elicit facts such investigations and reports should be subject to correction and review."

518. Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, at pp. 165-166, paras. 281-283. For summary of recommendations, see ibid., at p. 292, para. 62:

"62. All reports received by the court in relation to a child should be disclosed to the child's counsel; it will then be counsel's responsibility to decide how much of the information as disclosed therein should be revealed to the child or his parents. Where the child is represented by a person other than legal counsel that person, even if a parent, should be entitled to peruse the reports if he so requests (para. 283)."

519. See Elizabeth D. Dyson and Richard B. Dyson, "Family Court in the United States" (1969) 9 J. Family L. 1, at pp. 66-69; Note, "The Family in the Courts" (1955-56) 17 Univ. Pitt. L. Rev. 206, at pp. 246-252.
520. See text supra, at p. 382.
521. See text supra, at pp. 330-331.
522. See text supra, at pp. 407-411.
- 523.; See text supra, at p. 382.
524. Compare Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, text supra, at pp. 332 and 337-338; Civil Code Revision Office, Working Paper on the Establishment of a Family Court in Quebec, January, 1973, Recommendations 41 (investigative services), 43 and 44 (clinical services), 45 (youth services) and 46 (probation services), text supra, at pp. 361-363; Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee

on Productivity, February, 1971, text supra, at pp. 349-359.

525. See text to and contents of footnote 417, supra. See also Juvenile Delinquents Act, R.S.C., 1970, ch. J-3, section 32:

"32. Every probation officer, however appointed, is under the control and subject to the directions of the judge of the court with which such probation officer is connected, for all purposes of this Act."

526. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, at pp. 77-78.

527. But, with respect to clinical services, see text supra, at p. 470.

528. See footnote 527, supra.

529. See text supra, at p. 339.

530. Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February, 1971, text supra, at pp. 349-359. See also Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, text supra, at pp. 366-367. And see Report of Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, Chs. VII and IX.

531. Chief Judge H.T.G. Andrews, loc. cit., supra, footnote 530, at pp. 19-20; see generally, text at pp. 349-359 supra. See also Ontario Family Law Project, Vol. X, Family Court and Social Services, 1969, at p. 259:

"The Family Law Project recommends that consideration should be given to the setting up of a Branch or Bureau in an appropriate Government department, intended to deal specifically with (a) the prevention of delinquency, and (b) the availability and development of dispositional facilities for children, both delinquent children and children under Part II of the Child Welfare Act. Included in the functions of such a Branch or Bureau would be:

- (a) research with a view to placing Ontario in the ranks of the most advanced jurisdictions in the world;
- (i) in methods of dealing with delinquency prevention, and (ii) in the range and quality of dispositional facilities and powers in relation to

children; and

(b) Maintenance of close liaison between the family court system as proposed in this study, Government departments (and in particular the Child Welfare Branch), children's aid societies, and local authorities and communities. Co-ordination of work in this field of delinquency prevention throughout the Province."

532. Civil Code Revision Office, Working Paper on the Establishment of a Family Court in Quebec, January, 1973.
533. Canadian Corrections Association and Canadian Welfare Council, The Family Court in Canada, November, 1960, at p. 3, para. 5.
534. Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, at pp. 174-176, paras. 302-304. For summary of recommendations, see ibid., at p. 294, para. 72:

"72. The following recommendations are made concerning probation services:

- (a) each juvenile court should have available to it the services of at least one probation officer, and preferably as many as the burden of work requires;
- (b) the probation officer should devote his full time to work involving juveniles;
- (c) the probation officer should be responsible for pre-sentence investigation and for such personal supervision of a child or young person as may be directed by the court, and collateral duties should not be permitted to interfere with the proper performance of this primary function;
- (d) Probation officers should ordinarily have university education, should be adequately paid, and should receive the benefit of proper training for their duties;
- (e) research should be undertaken to determine suitable caseloads for officers and proper criteria for the selection of offenders for probation (para. 303)."

535. See text supra, at pp. 349-359.
536. Insert the name of the State administrative agency responsible for the State's program for the control and treatment of delinquency.
537. Insert the title of the **chief** judge of the court of highest general trial jurisdiction or other judicial officer or body responsible for the administration of the State judicial system.
538. Insert the name of the State department responsible for the administration of child welfare services, which may or may not be also responsible for services for delinquent children.
539. Insert date when this provision is to become effective.
540. U.S. Department of Health, Education and Welfare, Children's Bureau Publication 472-1969, Legislative Guide for Drafting Family and Juvenile Court Acts, at pp. 21-27, sections 19-23. For criticism of existing procedures and facilities in the United States, see, e.g., William J. Moshofsky, "A Proposal to Improve Court Services to Families and Children in Oregon" (1966) 46 Oregon L.Rev. 77, at p. 81:

"The National Council on Crime and Delinquency found other serious shortcomings, particularly in detention facilities and practices. Detention of juveniles may be defined as, 'custodial care when needed for the protection of society or the child *pending* disposition of the case.' It is not confinement for punishment. Detention facilities should be separate from the adult jail and should provide constructive activities for the child during detention. Although holding a child in jail is exceedingly poor practice, more than 2,000 are held in jail in Oregon each year. Only five of Oregon's thirty-six counties have separate detention facilities. Often, holding a child in jail merely confirms the criminal role in which he sees himself, thereby giving him status among his delinquent associates. Moreover, jailing children violates the whole concept and philosophy of the juvenile court system which (while it takes away some of their 'due process' rights) is supposed to provide them with constructive help. Separate, supervised detention facilities are essential."

And see Justine Wise Polier, Judge, New York State Family Court, A View From The Bench, N.C.C.D., 1964, at pp. 62-63:

"V. Shelter Services for Neglected Children

The court has the responsibility but not the authority to secure appropriate temporary shelter care for neglected children who must be removed from their homes pending disposition. It is dependent on the Department of Welfare for this service. Seventy-five per cent of the neglected children found to be in need of shelter care are placed in the overcrowded congregate shelters administered by the city Department of Welfare; planning for their care is not within the authority of the court. Placements that may distribute five children from the same family among three or four shelters cannot be changed except with the Department's consent.

For the majority of neglected children the 'temporary shelter care' given is temporary in name only. Out of 510 neglected children in shelters on April 30, 1963, only 71 had been in care less than one month; 51 had been in such care over one year.

A smaller proportion of neglected children placed in temporary shelters by court order receive foster home care pending disposition than do dependent children, for whom the Department of Welfare is directly responsible.

The present procedure under which the Department of Welfare selects the shelter placement of neglected children, pending disposition, should be revised. The court should have the power, as well as the responsibility, to place children under its jurisdiction in accordance with their needs. It should not be dependent for this essential service on decisions by another public agency.

VI. Length of Stay Pending Neglect Disposition

The Family Court Act provides definite safeguards against extended detention of delinquent children pending disposition. It fails to similarly protect neglected children.

The Family Court Act should be amended to provide definite safeguards against unreasonable

extension of the period allowed for holding neglected children in temporary shelter care pending disposition."

For trenchant criticism of current procedures and facilities in Canada and recommendations for change, see Report of Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, Ch.VII, Treatment Prior to Judicial Determination of Delinquency (pp. 115-119, paras. 205-212), and Ch. IX, Treatment Subsequent to Judicial Determination of Delinquency (p.166, para. 284, and pp. 176-187, paras. 306-336). For summary of relevant recommendations, see ibid., at pp. 289, 292 and 294-295, paras. 36-37, 63, and 74-82:

- "36. The use of detention should be reserved for
- (a) children who are almost certain to run away during the period when the court is studying the case or between disposition and transfer to an institution or another jurisdiction;
 - (b) children who are almost certain to commit an offence dangerous to themselves or to the community before the court disposition or between disposition and transfer to an institution or another jurisdiction; and
 - (c) children who must be held for another jurisdiction, for example, parole violators, runaways from institutions to which they were committed by a court, or certain material witnesses (para. 209).
37. The law should make it clear that there is an obligation on the authorities to bring promptly before the court young persons who are being dealt with under federal legislation relating to juveniles (para. 211).
63. Where, after a hearing, it is necessary to detain a child for the purpose of determining the disposition that should be made of the case, the length of time that the child can be held for this purpose should be limited to three weeks and, if more time is required, an application should be made to the court for authority to detain the child for an additional period, not exceeding two weeks (para. 284.)

74. The juvenile court should be the agency responsible for finding suitable foster homes, meeting prescribed standards, for those juvenile offenders who require them. At the same time, some means should be found whereby child-care agencies that receive assistance from government funds may be required by the court to assist it in its efforts to find foster homes. The court should consult any such agency before making an order that affects it (paras. 310, 311).

75. The expression 'industrial school' should be replaced by the term 'training school' (para. 312)

76. Institutional commitment should be ordered only as a last resort and the Act should be strengthened in order to give more adequate expression to this approach to the treatment of the juvenile offender (para. 313).

77. The provincial and federal governments should discuss jointly the development, staffing and operation of training schools, and the financing implications that would necessarily be involved (para. 323.).

78. If it is decided that power to transfer an offender from a training school to a correctional institution for adults is necessary, the training school or other correctional authorities should be required to make application for a transfer to the juvenile court judge, who would be authorized to make the appropriate order (para. 326).

79. Every effort should be made to develop a network of services for the care of children who are psychotic, severely disturbed or mentally retarded (para. 330).

80. Steps should be taken to provide 'group foster homes' where children, who must be taken out of their own homes, could derive benefit from a period of living in a small group in homelike surroundings under firm discipline (para. 331).

81. Every effort should be made to experiment with new approaches to the treatment of the juvenile offender, and in particular with measures that are community-based (para. 332).

82. After-care for young persons who have been committed to training schools should be compulsory and should be subject to the direction and control of the juvenile court. The responsibility for after-care supervision should preferably be assigned to the probation officer. Consideration should be given to making federal assistance available to any province that wishes to increase the staff of its probation service in order to implement a more adequate program of after-care (paras. 335, 336)."

541. Hon Mr. Justice Scarman, Family Law and Law Reform (Public Lecture presented at University of Bristol, March 18, 1966), at pp. 2-3, 5-6, and 17-19.
542. Judge H.A. Allard, Judge of the Juvenile and Family Courts of the Province of Alberta, Family Courts in Canada, in Mendes Da Costa, Studies in Canadian Family Law, Ch. 1, at pp. 21-22.

For statistics reflecting the high incidence of default in payments due under maintenance orders in Manitoba and for specific proposals for amendment of the law, see C.B. Cramer, Enforcement of Maintenance Orders by the Family Court—Submission to Manitoba Law Reform Commission, 1971.

As to the high incidence of default and the inefficacy of current legislation and procedures regulating inter-provincial and international enforcement of maintenance orders see generally, Professor Meher K. Master, Report of Research in Canadian Family Law (Reciprocal Enforcement of Maintenance Orders Act), Canada Council Research Grant S-70-1244. Commenting on the 237 files processed under the Reciprocal Enforcement of Maintenance Orders Act by the Attorney-General's Department in Manitoba between June 19, 1968 and December 31, 1969, Professor Master stated [ibid., at p. 114, para. 9]:

"9. In the great majority of cases in the 237 files, the husband had defaulted in payment of maintenance. The wife sought to enforce payment by invoking the R.E.M.O. Act but after a waiting period of anywhere up to four years, in the majority of cases under survey, the wife did not succeed in recovering any money; the cases were either adjourned sine die or a provisional order confirmed or varied, or the husband was threatened with a jail sentence, but payments continued to remain in arrears and the erring husbands continued to default."

See also Chief Judge H.T.G. Andrews, Submission to Ontario Government Committee on Productivity, February 1971, at pp. 14-15:

"In 1969, over eight million dollars were collected under maintenance orders. It is estimated that this probably represents about one-third of monies actually ordered to be paid. There is little doubt that the Government loses millions of dollars annually in the failure of husbands to reimburse for welfare monies expended."

543. Ontario Family Law Project, Vol. XII, Support Obligations, Part II, at pp. 593-609. See also Brief to the Vanier Institute of the Family on Maintenance Obligations in Ontario, 1971.

544. Civil Code Revision Office, Working Paper on the Establishment of a Family Court in Quebec, January, 1973.

As to the need to establish effective enforcement services in the Family Court, see also Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, at pp. 80-81, text supra, at pp. 334-335.

545. See text to and contents of footnote 18, supra.

546. Minutes of the Meeting of Canadian Law Reform Bodies to discuss Family Law, Edmonton, June 26-27, 1972, at pp. 95-96.

547. See text supra, at p. 519 and see contents of footnote 496.

548. See text to and contents of footnotes 482-486, supra. See also Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at pp. 1234-1235:

"It cannot be assumed, however, that alimony alone can provide for the economic consequences of divorce. Indeed, a recent survey concluded that the major difficulty with alimony is that it is generally insufficient to support the wife adequately. Moreover, even when alimony is granted there exists an enormous practical problem of enforcing its payment. Without attempting to canvass the still-growing body of literature dealing with the Uniform Reciprocal Enforcement of Support Act, it can be said generally that existing enforcement procedures are not utilized adequately in many states. The Commission recommended that the family court be allowed to require that the district attorney appear on behalf of a spouse and children to enforce alimony and child support orders in any case in which an order for alimony

had been made to a spouse having custody of minor children and an order of child support had also been made for the children. This proposal was an attempt to broaden existing law which permits the divorce court to direct the district attorney to appear on behalf of minor children to enforce child support orders. It seems that the court should also have been given authority to direct the district attorney to enforce alimony orders even when no minor children are living in the home. It appears, however, that no strong sentiment exists for public enforcement of the private support of divorced wives who do not have the care of minor children. This view appears shortsighted, particularly if the alternative is to be public support of the divorcee through welfare or general relief.

- 549. See text to and contents of footnote 543, supra.
- 550. L. Neville Brown, Matrimonial Maintenance in the United States, in Parental Custody and Matrimonial Maintenance: A Symposium, B.I.I.C.L. Comparative Law Series 13, at pp. 180-186.
- 551. See text to footnote 553, infra.
- 552. See text to footnote 550, supra. See also text to footnotes 486 and 487, supra.
- 553. Report of New Jersey Family Court Study Commission, March 27, 1972, at pp. 9-10.
- 554. U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at pp. 92-93.
- 555. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J. Family L. 505, at p. 564-565.
- 556. See J.D. Payne, "Corollary Relief in Nullity and Divorce Proceedings" (1969) 3 Ottawa L. Rev. 373; M.P. Downs and J.D. Payne, "Permanent Alimony" (1970) 18 Chitty's L.J. 289, 325, (1971) 19 Chitty's L.J. 1; J.D. Payne, "The Deserted Wives' and Children's Maintenance Act, R.S.O., 1960, Ch. 105: Proposals for Reform" (1969) 8 Western Ont. L. Rev. 67. See also Draft Working Paper on The Domestic Relations Act, Institute of Law Research and Reform, Province of Alberta, 1972; D.J. MacDougall, "Alimony and Maintenance Law in British Columbia", Draft Paper prepared for the British Columbia Law Reform Commission, 1972; C.B. Crammer, Enforcement of Maintenance Orders -- Submission to Manitoba Law Reform Commission, 1971; Ontario Family Law Project, Vols XI and XII, Support Obligations, 1969.

557. Dean Roscoe Pound, "The Place of the Family Court in the Judicial System" (1959) 5 N.P.P.A.J. 161, at pp. 161-163.

See Report of The Governor's Commission on the Family, California, 1966, at p. 10:

"It is essential to the proper functioning of a family tribunal that it be a part of the Superior Court, the Court of general jurisdiction. To attempt to 'spin off' a Family Court and constitute it as a separate entity would be to invite conflicts and overlapping of jurisdiction, and would result in the waste of public money by splintering the administration of the judicial process. As Dean Pound put it, the ideal is not a special tribunal for every special legal situation, but is instead a system of specially trained judges in a unified court system."

And see Professor Aidan R. Gough, "A Suggested Family Court System for California" (1964) 4 Santa Clara Lawyer 212, at pp. 216-217:

"We already have in operation courts whose 'jurisdictions' can be combined into an effective integrated whole. This could be done without altering the board structure of the superior court as it now exists, by creating within it the Family Court Division. This system would not sacrifice the best elements of our adversary process; would not displace the lawyer in his role as advocate and counselor in legal matters, but would at the same time allow greater use of skilled specialists in treatment of the family's problems; and would not result in the abdication of the safeguards of judicial control. Under such a system, the social sciences and the law could be combined to produce maximum effort toward preserving marriage and the family."

See also Professor Herma H. Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at p. 1241:

"Dean Pound has pointed out that the traditional response of the law to new legal problems from the time of Roman law through the development in England from the twelfth to the sixteenth centuries to twentieth century America has been to establish a new tribunal to deal with each

new problem, frequently without any clear definition of jurisdiction between the new court and its predecessors. He argues persuasively that this approach leads only to a duplication of effort that is wasteful both of public funds and private energy, and concludes that what is needed is not a special tribunal for every special legal system, but rather a system of specialist judges in a unified court. This problem is apparent in many areas of judicial administration, but it is particularly aggravated in the area of family law."

See P.J.E. Cole, "Family Courts — Their Nature and Function" (1971) 4 Man. L.J. 317, at p. 329:

" Creating a new and independent specialist court would appear to be an anachronistic approach to the problem. The modern trend, as evidenced by the English Judicature Act of 1873, is to have a single court, complete in itself, with the inferior local and special courts as branches or departments, with further divisions as needed, within those several departments. This has the obvious advantages of removing jurisdictional conflicts, avoiding successive appeals, centralizing and streamlining court administration and saving both the litigant and the taxpayer a lot of needless expenditure.

The most popular view is that the family court should be a division of the highest court of general trial jurisdiction, and this has much to commend it, in the way of status and jurisdiction."

- 558. Judge Paul W. Alexander, "Legal Sciences and The Social Sciences" (1956) 21 Missouri L. Rev. 105.
- 559. See Report, Temporary Commission on the Courts (The Plan for a Simplified State-Wide Court System), July 2, 1956. See also Report, Temporary Commission on the Courts (Recommendations for the Reorganizations of the Structure of the Courts of the State of New York and their Administration), Legis. Doc. No. 36 (1958). And see 4th Ann. Rep., Judicial Conference of the State of New York (Recommendations for Modernization of the Court Structure in the State of New York, 1958.
- 560. Professor Monrad G. Paulsen, "The New York Family Court Act" (1963) 12 Buffalo L. Rev. 420, at pp. 421-424.
- 561. Report of Family Court Study Commission, New Jersey, March, 1972, at pp. 4-6. See also Report of The Governor's Commission on the Family,

California, 1966, at p. 10, cited in footnote 557, supra. Compare text to footnote 560, supra.

562. U.S. Department of Health, Education and Welfare, Children's Bureau Publication No. 472-1969, Legislative Guide for Drafting Family and Juvenile Court Acts, section 3 and comment. Compare Standard Family Court Act, 1959 (N.C.C.D.), section 3 and comment:

" § 3. FAMILY COURT DIVISION

The family court shall be a division of [the highest court of general trial jurisdiction]. The state shall be divided into family court districts, for each of which a judge or judges shall be chosen as provided in Section []. In each county a family court shall be held at the courthouse or other duly designated place by the judge or judges of the family court district. The family court judge shall hold sessions in each county at times directed by the presiding judge of the family court, except that he may, at his discretion, hold court in any county within the district at any time required by the urgency of a case. The presiding judge may temporarily assign a family court judge to preside in another district when the urgency of one or more cases requires him to do so.

In any case in which it has jurisdiction, the court shall exercise general equity powers as authorized by law.

COMMENT ON SECTION 3

The family court should be a state-wide division of the highest court of general trial jurisdiction, thus commanding community prestige and having the necessary statute to obtain the services necessary for its full operation. Its judicial work is necessarily of a high order, and it should not be either a so-called "inferior" court or a specialized court, either of which would suffer the inherent limitations of inferior or special courts. The family court requires the full jurisdiction of the general trial court.

Although the family court should be placed within the existing court organization, it should be a separate division within the court structure at

the level of and a part of the highest court of general trial jurisdiction."

563. Lindsay G. Arthur, Administrative Judge of the Juvenile and Domestic Relations Divisions of the Fourth Judicial District Court of Minnesota, "A Family Court- Why Not?" (1966) 51 Minn. L. Rev. 223, at pp. 230-231. See also ibid., footnote 11:

"Its judicial work is necessarily of a high order, and it should not be either a so-called 'inferior' court or a specialized court, either of which would suffer the inherent limitations of inferior or special courts. The family court requires the full jurisdiction of the general trial court.

Although the family court should be placed within the existing court organization, it should be a separate division within the court of general trial jurisdiction. *Standard Family Court Act*, 5 CRIME & DELINQUENCY 109 (1959)."

564. Paul W. Alexander, "The Family Court - An Obstacle Race?" (1958) 19 Univ. Pitt. L. Rev. 602, footnote 1.
565. See contents of footnote 557, supra. See also Goldberg and Sheridan, "Family Courts—An Urgent Need" (1959) 8 J. Public. L. 537:

"Court status has a direct relationship to structure. Individuals and groups concerned with the legal processing of family problems believe that a court having jurisdiction over family cases should have status commanding the respect of the legal profession, of other persons coming before it, and of the community generally. They also believe that it will more likely achieve such status if part of the highest court of general trial jurisdiction."

And see Willim J. Moshofsky, "A Proposal to Improve Court Services to Families and Children in Oregon " (1966) 46 Oregon L. Rev. 77, at p. 79:

"Some of the reasons given for choosing the circuit court are these:

- (1) The circuit court is our court of general jurisdiction and has long had jurisdiction over matrimonial cases.

- (2) Juvenile jurisdiction has already been transferred to circuit court in seventeen counties.
- (3) Many circuit courts already have jurisdiction over commitment for mental illness and adoption.
- (4) Transition to a one-court approach through the circuit court is the least disruptive course.
- (5) Since all circuit court judges have the same legal qualifications and pay scale, greater uniformity of competent personnel throughout the state can be achieved."

566. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J. Family L. 505, at pp. 520-525. See also text to footnote 207, supra.
567. Joel F. Handler, "The Juvenile Court and The Adversary System: Problems of Function and Form" [1965] Wis. L. Rev. 7, at p. 17, cited in Report of Royal Commission Inquiry Into Civil Rights, Ontario, 1969, Vol. 2, Ch. 40, Juvenile and Family Courts, at p. 587. See also P.J.E. Cole, loc. cit., footnote 593, infra.

For recommendation that children's cases be determined by a division of the highest court of general trial jurisdiction, see U.S. Department of Health, Education and Welfare, Children's Bureau Publication No. 437-1966, Standards for Juvenile and Family Courts, at p. 29:

" Although the court that handles children's cases is seldom called upon to adjudicate issues involving great sums of money, it does determine issues which have lasting effect upon the lives of children and families. The determination of these issues also affects the community. Because of this, the court should have status which will attract high judicial caliber and command the respect of the members of the legal profession of the persons coming before it, and of the community generally. It is, therefore, recommended that the court be made a division of the highest court of general trial jurisdiction." This not only will provide the desired status but also will be a step in the direction of an integrated court system. It will also facilitate the development of a family court division since the highest court of general trial jurisdiction usually has jurisdiction over divorce, custody, adoption, and other proceedings requiring the

use of specialized services."

On the more general question whether the juvenile court should be integrated in a unified Family Court, see Note, (1955-56) 17 Univ. Pitt. L. Rev. 206, at pp. 228-229:

"Opponents of the integration of the juvenile court into a family court point to the undesirable consequences which the juvenile court experienced while it was under the jurisdiction of the county court. Objection is mainly centered on the fear that in a family court juvenile problems might be overshadowed and neglected due to the more spectacular and demanding adult problems. It is said that the juvenile court was discriminated against because money allocated to it was used for the benefit of the other courts. Further criticism is based upon the possibility that judges would be rotated so that no one judge would preside over juvenile problems for a long period. This, it is feared, would result in a lack of responsibility for juvenile procedure as well as the danger of failing to develop new techniques in the handling of children.

It is the conclusion of the interviewers that it would be more desirable to incorporate the juvenile court within the framework of a family court, leaving to it much of its present autonomy but allowing for a plenary treatment of family problems. This would provide the Court with a system of checks and balances under which every organization works more efficiently. Moreover, the experience and techniques which have been developed in the juvenile court could be more readily adapted in the family court's other divisions if the personnel of the former was assimilated into the integrated family court. The time-tested and proven techniques of the juvenile court should be adopted by the family court and the experience and advice of juvenile court personnel are indispensable to its organization.

If the juvenile court is an integral part of a family court, all phases of domestic relations problems should benefit by the association. The logical unit in the problem — the family — will be the focal point, and instead of a piecemeal

treatment a complete insight into the family problem may be obtained. Not only the child but also the parents frequently will be amenable to the processes of the court. For example, delinquency often occurs in a broken home and divorce actions and delinquency cases may have their origins in the same causes.

A further advantage of a family court which includes a juvenile court division is that not only will the various judges profit from such an association but there will also be some check on the over-all operations and the chance of arbitrary discretion would be at a minimum."

Compare Professor Herma Hill Kay, "A Family Court: The California Proposal" (1968) 56 Calif. L. Rev. 1205, at pp. 1239-1240:

" The California proposal recommends that the family court exercise unified jurisdiction over all legal questions affecting the family. Surprisingly, this suggestion has proved to be one of the most controversial aspects of the report. Some of the objections to it appear to be based in part on dissatisfaction with the juvenile court and an accompanying reluctance to include any juvenile matters within the family court. It has also been suggested that the new emphasis on constitutional rights of juveniles arising from the *Gault* case may push legal practice in delinquency matters closer to the technicalities of the criminal court. If this tendency is viewed as creating a corresponding divergence between the delinquency and neglect caseloads of the juvenile court, one solution may be to transfer only the neglect and dependency cases to the family court in order to allow the delinquency cases to develop separately. The California report made no attempt to deal with this question. Instead, it proposed merely a formal unification between the two courts, suggesting a family court with two separate divisions, a juvenile division and a domestic division. No attempt was made to work out a method of combining the daily work of the two divisions. More thoughtful planning would be required to achieve real integration of the two courts. It may be that such an attempt should not be made until the family court's

domestic division has been allowed time to develop its own style free from the need to reorganize the juvenile court system."

And see text supra, at p. 299 et. seq.

568. Hugh W. Silverman, Q.C., "The Family Court: A Proposal for Reform" (1973) 21 Chitty's L.J. 169, at p. 170.
569. Elizabeth D. Dyson and Richard B. Dyson, loc. cit, supra, footnote 566, at pp. 574-578. See also "The Standard Family Court Act Appraised" (1959-60) 35 Indiana L.J. 462, at pp. 463-464:

" The act provides for the appointment of referees and grants the judge discretion in directing which cases shall be heard in the first instance by the referee. Several members of the committee which drafted the act opposed the use of referees saying it would be unnecessary if a sufficient number of judges were appointed. The fallacy in this argument is that the volume of cases will not always remain constant. A prudent use of the referee when the court is overburdened would permit prompt attention to all cases when the calendar is crowded and eliminate the inexpediency of having too many judges during the slack periods. The utility of a referee is doubtful, however, because any dissatisfied party may have review, including the right to offer new evidence at the judge's discretion. This just may add another step to the judicial process. Much depends upon the deference given to the referee's conclusions. Although the delay may be obviated by requesting a hearing before the judge in the first instance, a party may forbear exercising this right for fear of antagonizing a judge who wants the referee to hear it first."

See Standard Family Court Act, 1959, (N.C.C.D.), section 7

and comment:

"§ 7. APPOINTMENT OF REFEREES; DUTIES

The judge, or senior judge if there is more than one, may appoint suitable persons trained in the law, to act as referees, who shall hold office during the pleasure of the judge. The judge may direct that any case, or all cases of a class or within a district

to be designated by him, shall be heard in the first instance by a referee in the manner provided for the hearing of cases by the court, but any party may, upon request, have a hearing before the judge in the first instance. At the conclusion of a hearing the referee shall transmit promptly to the judge all papers relating to the case, together with his findings and recommendation in writing.

Written notice of the referee's findings and recommendations shall be given to the parent, guardian, or custodian of any child whose case has been heard by a referee, or to all parties in a family case. A hearing by the judge shall be allowed if any of them files with the court a request for review, provided that the request is filed within three days after the referee's written notice. If a hearing de novo is not requested by any party or ordered by the court, the hearing shall be upon the same evidence heard by the referee, provided that new evidence may be admitted in the discretion of the judge. If a hearing before the judge is not requested or the right to the review is waived, the findings and recommendations of the referee, when confirmed by an order of the judge, shall become the decree of the court.

COMMENT ON SECTION 7

Referees are valuable in special types of cases; in busy courts they give the judge more time for difficult cases, they secure more prompt action where the jurisdiction covers a wide area.

The judge is given discretion to direct that any case or all cases of a class designated by him be heard in the first instance by a referee. The judge may wish to direct that cases such as the following be reserved to him: family cases generally; cases in which a child is likely to be removed from the custody of his parents; cases in which the parties are likely to demand a hearing before the judge; delinquency cases involving death or serious violence; cases in which the parties are represented by attorneys, unless their consent to a hearing before the referee is given; cases in which questions of

law are involved.

The right of a hearing before the judge, when demanded, must be respected. The written notice is required in order to assure the parties of the adequacy of the hearing and of their rights. Without this and other provisions clearly establishing due process of law, the court rightly becomes an object of criticism for its disregard of the rights of individuals before it.

Several members of the committee opposed the provision for referees, stressing the values of a good intake department in screening and preparing cases, and the need to have a sufficient number of judges for all judicial hearings.

The National Council of Juvenile Court Judges has a committee that is studying the question of the use of referees in juvenile and family courts. It is considering, among other aspects, whether use of referees is a proper way of supplying needed additional judicial manpower."

Compare Family Court Act (Hawaii), Act 232, S.L.H. 1965, section 333-7, as amended by Act 56, S.L.H., 1967, section 1:

" Sec. 333-7. Appointment of referees, duties. The judge or senior judge, if there is more than one, may appoint licensed or such suitable persons trained in the law, to act as referees, who shall hold office during the pleasure of the senior judge or judge. Such other person shall be selected from eligible lists secured through competitive examinations. The compensation of such referees shall be determined pursuant to the provisions of chapter 4. The senior judge or judge may direct that any case coming within the jurisdictional provisions of this chapter, or all cases of a class or within a district to be designated by him, shall be heard in the first instance by a referee in the manner provided for the hearing of cases by the court, but any party may, upon request, have a hearing before a judge in the first instance. At the conclusion of a hearing the referee shall transmit promptly to the senior judge or judge all papers relating to the case, together with his findings and recommendations in writing.

Such referees shall have power to administer oaths, to perpetuate testimony under the rules and orders of the family court, and to issue commissions for the perpetuation of testimony to be used in controversies pending before them, to grant continuances of proceedings before them, to subpoena and compel the attendance of witnesses within their respective circuits and to punish contempts according to law.

Written notice of the referee's findings and recommendations shall be given to the minor if he is of sufficient age to understand the nature of the notice, and to the parent, guardian, or custodian of such minor, in all cases heard by the referee coming within the provisions of Section 333-8, except uncontested cases coming within subsections (c) through (h), and to all parties in contested adoption cases and in contested cases coming within the provisions of Section 333-11. A hearing by a judge shall be allowed if any of such persons files with the court a request for review, provided that the request is filed within five days after the referee's written notice which shall apprise such persons of their rights to request such review. If a hearing de novo is not requested by any party or ordered by the court, the hearing shall be upon the same evidence heard by the referee and reported in his findings, provided that new evidence may be admitted in the discretion of the judge. If a hearing before a judge is not requested or the right to the review is waived, the findings and recommendations of the referee, when confirmed by an order of a judge, shall become the decree of the court."

See also U.S. Department of Health, Education and Welfare, Children's Bureau Publication No. 472-1969, Legislative Guide for Drafting Family and Juvenile Court Acts, section 4 and comment:

"SECTION 4. Referees.

(a) The ()¹ may appoint one or more persons to serve as referees on a full or part-time basis. They shall be members of the bar. Their compensation shall be fixed by the ()¹ with the approval of the ()² and paid out of the general revenue funds of the ()³.

(b) Hearings shall be conducted only by a judge, if:

- (1) the hearing is contested;
- (2) the hearing is one to determine whether a case shall be transferred for criminal prosecution as provided in Section 31; or
- (3) a party objects to the hearing being held by a referee.

Otherwise, the ()¹ may direct that hearings in any case or class of cases shall be conducted in the first instance by a referee in the manner provided for by this Act.

(c) Upon the conclusion of a hearing before a referee, he shall transmit his findings and recommendations for disposition in writing to the judge. Prompt written notice of the findings and recommendations together with copies thereof shall be given to the parties to the proceeding. The written notice shall also inform them of the right to a rehearing before the judge.

(d) A rehearing may be ordered by the judge at any time and shall be ordered if any party files a written request therefor within 3 days after the referee's written notice. If a hearing de novo is not requested by any party or ordered by the court, the hearing shall be upon the same evidence heard by the referee, provided that new evidence may be admitted in the discretion of the judge.

(e) If a hearing before the judge is not requested or ordered or the right thereto is waived, the findings and recommendations of the referee, when confirmed by an order of the judge, shall become the decree of the court.

COMMENT

It is not intended that referees be used as substitutes where additional judges are needed. However, they serve a purpose where the judicial load is too great for one judge but not great enough for two judges. Also, their use on a part-time basis in large circuits may facilitate the administration of juvenile justice. As judicial officers, they should be members of the bar. They should not carry any probation duties—supervisory

or otherwise—since this could create a conflict of interest in discharging the duties of a referee in cases where they were active in another capacity.

1. Insert title of chief judge of court of highest general trial jurisdiction.
2. Insert appropriate budgetary authority.
3. Insert appropriate source of funds."

For relevant recommendations in Civil Code Revision Office, Working Paper on the Establishment of a Family Court in Quebec, January, 1973, see infra, text to footnote 574.

570. See text supra, at pp. 228-229.
571. Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, at pp. 31-51.
572. Ontario Family Law Project, Vol. X, Family Court and Social Services, 1969, at pp. 242-244, 246-248, and 260-265.
573. Civil Code Revision Office, Working Paper on the Establishment of a Family Court in Quebec, January, 1973, at pp. 21-22 and 27-35.
574. Ibid., at pp. 42-46.
575. Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at p. 22.

On the dangers of an inter-curial referral scheme, see P.J.E. Cole, "Family Courts — Their Nature and Function" (1971) 4 Man. L.J. 317, at pp. 331-332:

" The experience of the New York Court is even more revealing. By leaving major matrimonial actions outside the court's jurisdiction, and instead substituting a complex referral scheme, the state's legislators have simply recreated the old problems of multiple actions and conflicting jurisdictions in a new form. This is one of the major reasons why New York's family court judges are anxious to see their court merged in the Supreme Court.

The situations described above leave little doubt of the value of having an integrated jurisdiction, however, there is still some controversy over the extent of that jurisdiction."

See also Professor Monrad G. Paulsen, text to footnote 560, supra.

576. Judge H.A. Allard, Family Courts in Canada, in D. Mendes Da Costa, Studies in Canadian Family Law, Ch. 1, at pp. 27-32. See also ibid., at pp. 35-58:

"J. PROPOSALS FOR FAMILY COURT STRUCTURES

A variety of alternative arrangements can usefully be examined in considering future family court developments; they are as follows:

(i) A Supreme Court of comprehensive jurisdiction encompassing child protection, adoption, affiliation, delinquency and matrimonial disputes including divorce. This proposal would absorb the existing family courts and other matters now heard in the lower courts. The social services would be unified with this structure.

(ii) Existing family courts might be expanded to include all the jurisdiction suggested in (i) with the exception of divorce. The social services of the expanded family court would be available to the superior court in divorce matters.

(iii) The creation of domestic relations division of provincial Supreme Courts. These Courts would take on the family law matters now heard in the lower courts, but would not have jurisdiction in delinquency, child welfare and related children's cases. Such a higher court could have specialist judges and a full-time specialist social service.

(iv) Jurisdiction between the various courts might be left as it is at present, merely offering to the Supreme Court the same social services available to the lower court. The suggestion is that rules could be created to oblige both courts to set up comprehensive social services and create methods for their use wherever indicated.

(v) Create a system in each of the provincial Supreme Courts for specialist family court referees or masters who would also hold appointments as magistrates to hear certain children's cases. They would not be empowered to hear divorce cases but could make the directions in respect to custody and maintenance in such proceedings. This arrangement would terminate, at least in the larger cities, the existing family courts and the social services would become an adjunct of the new court.

(vi) A further proposal is to restructure the present family courts so that the social agency functions are in another setting entirely. It may be argued that in order to provide a continuity and economy of service that the social work functions should rest in a comprehensive social agency entirely outside the court. This means that the intake function, counselling processes and specialized reports would be available to a specialized, narrowly legal Family Court and to the Supreme Court in matters within its existing family law jurisdiction. In order to succeed, the court would have to be a willing host to welfare services beyond its immediate control. The courts would have to accept unique arrangements for the commencement of trials, the acceptance of complaints and a referral service as many people will come to the court seeking social services which it could not offer.

Changes of structure should not be necessarily of higher cost. Many of the functions suggested are already being carried out by children's aid societies, provincial child welfare departments and family counselling services. Most proposals would merely regroup these resources and bring them into more ready use within the specialized family court. The social cost of failing to provide services is not known. In any development or proposal, a research program should be an integral part so that cost and effectiveness can be more clearly documented. It is unfortunate that after many studies and many years of experience that at this point one can only conjecture as to how best the community is served in the provision of social services.

There may be reason for delay in structuring a family court which encompasses all Family Court matters, but much could be done to immediately improve the family court within existing provisions. In addition to the foregoing devices, steps could be taken to create uniform legislation from province to province. The great mobility of persons throughout Canada, and the subsequent opportunity to avoid duties poses an obvious problem.- Contradictory practices and legislation from province to province result in distress to the parties and disrespect for the courts. How can one accept the premise that a child reaches maturity at 16 in Saskatchewan and 21 in Alberta for the purposes of maintenance,

or that a wife has a duty to support her children in British Columbia, but not the same duty in Alberta; or that one might find a remedy for a custody dispute in Ontario in the Family Court, but in no lower court in Saskatchewan; how can it be explained that in one province services are available in one centre and not in another, or that in one province there are no Family Courts at all? Those responsible for the administration of justice have an obligation to sort out the conflicts, remove duplication and ensure that services of a social nature are available to all the courts. Effective use and acceptance of such services perhaps should come before any major reorganization. There are, at this time, many critics of the Juvenile and Family Court and its specialized approaches. Some lawyers see psychiatrists, marriage counsellors and social workers as having a damaging influence upon litigants and the courts. The social sciences are unfamiliar to persons with ordinary legal training and experience and therefore of doubtful validity to some legal practitioners. The critic's position has been enhanced due to the shortage of competent probation officers and counsellors arising out of poor pay and a poor career potential.

The major issue, however, is not at what court level matters are to be heard or whether they are to be all heard in one court or specifically what legislation will cover the practices or particular devices for intervention. The major issue is what fundamental kind of attitude, what basic assumptions are to be made about how persons experiencing family difficulties are to be dealt with in the court wherever they may be heard. Professions cannot compete with one another for various approaches and neither can any profession separate the family into 'isolated persons' for the delivery of services; services cannot be based on fee, on the ability to pay fees, or the mere response to an authoritative direction as to duties and obligations. The primary victims of family collapse are the children, and they must receive paramount concern. The secondary factor which must receive urgent concern is the preservation of the strengths of the individual partners. Every process must be examined so that that which is destructive is diminished and that which is helpful and constructive is enhanced, whether

this be by due process or by treatment devices. There should be no conflict between either approach if both are structured and directed in a "helpful manner". The aims and objectives of a 'good social approach' and of a 'good law' should be compatible and they should also be purposefully brought together. Sophisticated research is necessary to determine what is 'good', what is 'helpful'."

577. Judge David M. Steinberg, Preliminary Report on the Drafting of Model Unified Family Court Legislation, June 6, 1973, at pp. 115-124
578. Submission of the County and District Court Judges Association of Ontario to the Ontario Law Reform Commission, October 12, 1972.

Compare Fred Reagh, "The Need for a Comprehensive Family Court System " (1970) 5 U.B.C. Law Rev. 13, at pp. 37-41:

" What then is the most practical type of family system for British Columbia? Based upon the models existing elsewhere which have been examined above, three possible alternatives suggest themselves:

(i) Increase the scope of the present family court, adding to it the facilities and jurisdiction necessary for the handling of divorce proceedings.

(ii) Establish a 'domestic relations division' within the existing Supreme Court leaving juvenile jurisdiction where it now is, with the 'Family and Childrens' Court.'

(iii) Integrate the Family and Childrens' Court into the Supreme Court — but as a separate division within that court, having jurisdiction over divorce, delinquency and all ancillary matters. ...

Just which of the three above alternatives is most suited to British Columbia is a matter for conjecture, however, it might depend upon the final application of recent Provincial legislation which will have the effect of:

(i) Integrating the present county courts into the provincial Supreme Court structure; and

(ii) Making the present magistrates' courts —including the family and childrens courts into a single new 'Provincial Court.'

...If however, the goal is to establish a fully integrated type of family court like those in Ohio and new Hawaii there must first be a willingness to raise the present court to Supreme Court status. Secondly, arrangements must be made to fund its operations out of Provincial revenues. The constitutional problem involving the status of the court's judges could be resolved if the Province were determined to do so. Perhaps it could cause the present family court judges, (who are in fact magistrates) to be appointed to the Supreme Court bench, in accordance with some acceptable procedure necessarily pursuant to Section 96 of the British North America Act. Thus, a 'Family Division' of the Supreme Court (rather than the Provincial Court as now in effect) would be established. One trembles, however, at the thought of what such a facility would cost—if present dollar values are considered separately from the potential savings in the future—in both coin of the realm, and, more importantly, human suffering. Clearly, other jurisdictions have had to wrestle with the problem of balancing economics with social utility in establishing courts like those examined above, with the result that such tribunals have expanded, and in no case, to the writer's knowledge, has one been scrapped or integrated to effect dollar economies.

....Assuming that social pressure was presently sufficient to foster establishment of a 'Toledo Style' court as a division of the Supreme Court, much time and money would be required to provide the special facility required to meet the demands of such a comprehensive and specialized jurisdiction. Because of the immense practical difficulties involved then, it would be idle to advocate that the province should opt for the integrated Supreme Court-level alternative.

Of the other alternatives mentioned, one of the two holds real promise, being economically expedient and, on a balance of utility, more efficient. The establishment of a 'domestic relations division' of the Supreme Court would avoid both financial and jurisdictional problems and would be a logical and proper initial step in the enlightened handling of divorce matters. Utilizing the philosophy, techniques and organizational pattern of the existing Family and Childrens' Court, the new Court would be quickly effective, as in Hawaii, where a similar reorganization took place...

Choice of this alternative would afford the greatest opportunities for familiarization and experimentation. The initial costs of adding to and adapting present court facilities would not be prohibitive, considering the potential of a re-programmed divorce court. The appointment of one or two judges to preside over this division of the court would not lead to any congestion in the handling of the remaining Supreme Court litigation, since divorce matters would no longer appear on the main court calendar. Selection of the judge or judges would be made by the Chief Justice—who would consider prior training, interest and ability—for a minimum term of perhaps two to four years, subject to renewal if desired. It is to be expected that a steady diet of divorce proceedings may prove fatal to the sensitivity and perspective of even the most highly motivated judge.

While the court structure may be varied somewhat and though the calibre of the judge be high, he cannot act effectively alone. Marriage counsellors attached to the court would give 'short-contact' counselling as in the Los Angeles example. Their role would be to screen to investigate and advise through a limited number of interviews, and to effect reconciliation in the few cases where it is possible. More frequently, their task would be to assist in bringing about the most satisfactory custody, support and property division agreements that circumstances permit.

...Lawyers would continue to have an essential role in the divorce proceedings, especially where any ancillary matter to the divorce action is in dispute, and they should be in attendance at those counselling sessions wherein the disposition of property is being considered...

The essence of these proposals for a drastic change in the handling of divorce in British Columbia is the 'team' approach to which there will likely be many conscientious objectors among members of both bench and bar. In this connection, Judge Alexander suggests that these protests would be erased.

'...by acceptance of the fact that the lawyer is not the best equipped person to salvage a sinking marriage. Science, industry and business all employ the team approach. Even theology countenances it.

Only the law has tried to remain self-sufficient."

Compare also James C. MacDonald, "A Comprehensive Family Court" (1967) 10 Can. B.J. 323, at pp. 329 and 332:

" Confining all family jurisdiction to one Court could be done without much difficulty. As matters are at present, the Supreme Court should not be the Court because it is not easily accessible from all parts of the province. The County Court is more convenient. For years County Court Judges in England have presided over divorce cases as Commissioners of the High Court, and they are now being vested with this jurisdiction in their own right. In our country, British Columbia County Court Judges as Local Judges of the Supreme Court are now deciding divorce cases. The Honourable Mr. McRuer, former Chief Justice of the High Court of Ontario, suggested to the Parliamentary Committee on the 31st day of January, [1968], that the County Court is the Court which should try divorce cases. The rest of the jurisdiction which we have been giving our thoughts to could be easily sent along.

Such a step might be some improvement, but it does not go far enough, principally because family matters require a specialized approach and full-time attention. A family case cannot be tried satisfactorily in between a negligence action, and a dispute over the validity of a will. We are reminded of Judge O'Hearn's observation that Supreme Court Judges, and presumably County Court Judges, do not 'have the outlook to deal properly with domestic problems'.

...The Court if it is to have the responsibility of adjudicating on all issues affecting the family should have a status commensurate with that responsibility. It should be a part of the High Court. To be effective, it should have both a summary and ordinary process. The United Church brief to the Parliamentary Committee suggested that the Court should be composed of two divisions to be known as the High Court Division, and the Family Court Division. The Family Court Division would be the Court of summary process, and have such jurisdiction as the Governor-General in

Council from time to time delegated to it. A suggestion somewhat along the same line was made by Mr. Justice Scarman [formerly Chairman of the Law Commission (England)] suggested there be a pattern of regional Family Courts controlled by the Supreme Court. He would consider:

(1) The establishment of a Family Division of the Supreme Court which, while exercising jurisdiction at first instance in cases of difficulty or complexity, would as its principal function exercise a supervisory and appellate jurisdiction on questions of law over a system of regional Family Courts.

(2) The establishment of Regional Family Courts with legal chairman drawn from the High Court, and County Court benches, serving on a rota system, and able to recruit, when necessary lay justices experienced in family work to sit as full members of the Court. ..."

579. See text supra, at pp. 77-80.

580. See text to footnotes 561 and 577, supra.

581. For consideration of the constitutional implications of delegation of functions to a referee, see text supra, at pp. 106-109.

582. Compare Institute of Law Research and Reform, Province of Alberta, Working Paper, Family Court, April, 1972, at pp. 56-62. See ibid., Recommendations 9-11:

"RECOMMENDATION #9:

THAT APPEALS FROM FINAL DECISIONS
OF JUDGES OF THE FAMILY COURT,
WHETHER PROVINCIALY OR FEDERALLY
APPOINTED, SHOULD BE TO THE
APPELLATE DIVISION IN THE USUAL
WAY AND AS OF RIGHT.

RECOMMENDATION # 10:

(1) THAT THE CRIMINAL CODE BE
AMENDED TO PROVIDE THAT APPEALS
UNDER SECTIONS 197(2)(a), 245(1)(b)
AND 745 OF THE CRIMINAL CODE BE TO THE
APPELLATE DIVISION.

(2) THAT LIQUOR CONTROL ACT BE AMENDED TO PROVIDE THAT APPEALS UNDER SECTION 100 OF THE LIQUOR CONTROL ACT SHALL BE GOVERNED BY AND IN ACCORDANCE WITH THE PROVISIONS OF THE CRIMINAL CODE RELATING TO APPEALS UNDER SECTIONS 197(2)(a), 245(1)(b) AND 745 OF THE CRIMINAL CODE.

(3) THAT UNTIL THIS IS DONE, FEDERALLY APPOINTED JUDGES OF THE FAMILY COURT BE APPOINTED EX OFFICIO JUDGES OF THE DISTRICT COURT TO HEAR THESE APPEALS.

RECOMMENDATION #11:

THAT IN INTERIM AND INTERLOCUTORY MATTERS THERE BE AN APPEAL TO THE APPELLATE DIVISION BUT THAT THE QUORUM SHOULD BE A SINGLE JUDGE AND THAT THE JUDICATURE ACT SHOULD BE AMENDED ACCORDINGLY."

583. See text supra, at pp. 120-122.

584. See text supra, at pp. 81-82.

585. See footnote 289, supra.

586. Report of the Subcommittee on The Conciliation Court of Los Angeles County, California, submitted to the Matrimonial Actions Committee, Family Law Section, American Bar Association, June, 1961, at pp. 5-8.

See Lester E. Olson, Supervising Judge, The Conciliation Court of Los Angeles County, 6th ed., January, 1970, at p. 12:

" The judge does not engage in marriage counseling and for a very good reason he is not a trained marriage counselor. In fact, conciliation procedures have uniformly failed and been discontinued when judges have been assigned such extra-judicial duties. However, it cannot be over emphasized that the success of a conciliation program should be under the direct control of an interested and concerned judge."

See also Meyer Elkin, Director, Family Counseling Services, Conciliation Court of the Superior Court, Los Angeles County, California, "Family Law Reform: California's Constructive Break

With Legal Tradition" Conciliation Courts Review, Vol. 9, No. 1, September, 1971, at p. 12:

"A good judge should not engage in marriage counseling, and for a very good reason — he is not a trained marriage counselor."

And see Thomas Coakley, Judge of the Superior Court, Mariposa County, California, "Are They Just Statistics? The Need for Family Courts", An address to St. Thomas More Society, San Francisco, January 7, 1960:

"On this phase of the subject Judge Pfaff had this to say:

'I am convinced that it is useless to simply designate a Judge as a Conciliation Court Judge, without providing him with trained social workers experienced in marriage counselling. In practically every instance where a judge has been delegated the task of conducting marriage counselling, the program has been frustrated and fouled, and the Conciliation Court program abandoned.'"

Compare Judge Frank H. Myers, "Washington's New Domestic Relations Tribunal" (1956-57) 6 Cath. L. Rev. 139, at pp. 142-143:

" Accordingly, a rule was adopted providing for reconciliation conferences both *before* suit was filed and *after* suit was filed. In the first instance, if a married couple were experiencing domestic difficulties and desired to discuss their problems with one of the judges of the new branch looking to a possible adjustment of their controversy through the aid and counsel of a disinterested party, a form of petition has been provided which they could *jointly* fill out and sign in the clerk's officer asking for such a conference. No fee is charged. The clerk then sets the petition down on the conference calendar of one of the judges and notifies the applicants of the date thereof. On that date, the parties voluntarily appear. They may be accompanied by their attorneys if they desire. The judge then discusses the problems involved in their situation, first individually and then jointly, and endeavors to point out to each the weaknesses or fallacies of their positions and to recommend what in his opinion each must do to adjust his or her difficulties. If, in the conference, it is

revealed that there are matters which require the judge to suggest counseling with experts in other fields, such as the psychiatrist, the physician, the religious leader of their faith, or the social welfare worker, in order that more competent information and counseling can be secured, he will direct the parties to voluntarily consult this new source, if they are financially able to pay for the expense of such expert counselling or, if they are indigent or in the low income bracket, he will endeavor to refer them to a source available through the District of Columbia Health Department or the Family and Child Welfare Section of the United Community Services, or for spiritual aid from one of the religious denominations in the community.

After suit has been filed and personal service is obtained upon the other spouse who files an answer contesting the right to a divorce, the case being then contested is placed upon the pre-trial calendar for conference with one of the judges. If, as a result of the conference with the judge, the parties are able mutually to agree concerning their difficulties, an order is prepared by the judge setting up the understanding between the parties and the conditions essential for a definite adjustment of the marital difficulties, signed by both parties and approved by the conference judge. Of course, it must be realized that this so-called 'order' has no legal effect or status but represents a voluntary statement in writing embodying the agreement of the parties. It does have a moral effect upon the husband and wife, each of whom receives a signed copy of said order for their guidance in the future. The original petition for the conference and the final order showing a successful reconciliation agreement are confidential and not subject to subsequent examination except by the parties or their attorneys.

On the other hand, if the judge was unsuccessful in persuading the parties to a voluntary adjustment of their marital difficulties after a full conference, the petition is marked 'Reconciliation Not Effected' and placed in the closed confidential files of the court.

The same procedure as outlined above in the pre-trial reconciliation conference except that the latter is governed by Rule 16 of the Federal Rules of Civil Procedure. The pre-trial judge at this conference endeavors to bring about a reconciliation of the parties and a preservation of the marriage. He fully discusses with the parties and their counsel all phases of the marital difficulties with a view to achieving an adjustment thereof without further court procedure. If he is successful in obtaining the voluntary consent of the parties to try again, a reconciliation agreement is reduced to writing, signed by the parties and filed in the cause which is then marked 'Settled and Dismissed Without Prejudice.' On the other hand, if the parties are unwilling to resume their marital association, the judge then discusses the issues in the cause, attempts to get stipulations as to facts which are uncontroverted, marks the cause with the notation 'Reconciliation Not Effectuated,' ascertains the length of trial and prepares a pre-trial order governing the future conduct of the trial."

Compare also Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1969) 9 J. Family L. 1, at pp. 37-38:

" Besides employing family counselors to supply marriage counseling, the Rhode Island Family Court Act explicitly directs the judges themselves to 'seek to reconcile the parties and to re-establish friendly family relations, and to this end [they] may suggest and hold conferences in chambers with the parties interested....'

Not all the judges exercise the counseling powers granted. But the chief judge is convinced of the value of the selective use of counseling in chambers. When a case 'seems to be getting nowhere,' and he thinks the parties really do not want a divorce, he calls a recess and invites the parties to attend a voluntary conference in his office. In the hall he usually tells the parties' lawyers they may attend too, but 'usually they know enough not to come along.' After conversing informally with the parties, he tries to get them to consider psychiatric assistance, 'though I try not to call it by that time.' Ordinarily he only has time for one conference of this

kind, though he might ask the parties to drop by once again for encouragement if they decide to reconcile.

The chief judge has estimated that through these and other methods, the family court probably saves between two and three hundred marriages a year. These figures were announced before the family counseling service was set up. He has said that he hopes the new service will increase the reconciliation rate by at least 30 per cent.

These statistics and projections are, of course, imprecise and possibly inaccurate. But in any case, 'reconciliation' statistics are inherently misleading, since reconciliations are often only temporary, and follow-up studies are seldom if ever done."

And see Judge H.A. Allard, *Family Courts in Canada*, in D. Mendes Da Costa, *Studies in Canadian Family Law*, Ch. 1, at p. 7:

"The present s. 20(1) of the Manitoba Wives' and Children's Maintenance Act reads:

'Before a public hearing of any proceedings under this Act, the judge or magistrate shall consider, having regard to the information, whether it will be well to hear the parties in private with a view to settlement by mutual consent of the matters in question; and if he thinks fit he may summon the parties to appear before him and shall hear them in private with the intent before mentioned, and may receive in their presence information from any person whom the judge or magistrate believes to have knowledge of the relationship of the parties.'"

587. See text to footnote 571, supra.

588. Institute of Law Research and Reform, Alberta, Working Paper, Family Court, April 1972, at pp. 51-55.

589. Compare New York Family Court Act, 1962, section 124. See Professor Monrad G. Paulsen, "The New York Family Court Act" (1963) 12 Buffalo L. Rev. 420, at p. 425:

" In the City of New York the Family Court is to consist of 23 judges appointed by the

mayor for a term of 10 years. The only qualification for appointment is that the candidate be admitted to practice law in the state for 10 years. The mayor, is, however, exhorted to appoint those who are especially qualified for Family Court work by reason of their character, personality, tact, patience, and common sense.

In counties outside the City of New York, the judges of the County Court act as and discharge the duties of the judge of the Family Court except that in certain of the larger counties, where special Children's Court judges had been sitting under the prior law, an equivalent number of Family Court judges was authorized by statute. Outside the City, the judges are elected for a term of 10 years."

- 590. U.S. Department of Labor, Children's Bureau Publication 193, The Child, The Family, And The Court, Washington, 1929, at p. 21.
- 591. U.S. Department of Health, Education and Welfare, Children's Bureau Publication No. 437-1966, Standards for Juvenile and Family Courts.
- 592. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J. Family L. 505, at pp. 568-569.
- 593. Canadian Corrections Association and Canadian Welfare Council, The Family Court in Canada, November, 1960, at p. 5.

See also P.J.E. Cole, "Family Courts — Their Nature and Function" (1971) 4 Man. L. J. 317, at pp. 334-335:

" It has been said that a court is only as good as the judge who presides over it and there is a lot of truth in this, especially in domestic matters where judicial discretion is a marked characteristics of the proceedings. One of the prime reasons for the failure of the juvenile courts in the United States was the conspicuous absence of '...the mature and sophisticated judge, wise and well versed in law and science of human behaviour.' The family courts did manage to attract a few outstanding judges but the overall calibre was low, principally because of the conditions in which they were forced to work. Competent men simply did not want to end up being relegated to the bottom of the judicial barrel. The Chief Judge of the Rhode

Island Supreme Court was quoted publicly as saying he knew of at least one family court judge who detested his work. In New York, family court positions are commonly regarded as stepping stones to higher judicial rank. In 1967, the New York Times commented, in regard to the state's family court judges urging that the court be made a division of the Supreme Court, that '...inherent in such a merger would be automatic increases in status and income for Family Court judges.'

Even if the desired status and pecuniary rewards were achieved there would still be problems in getting competent men because of the methods of appointment currently in use. Far too often the dictates of politics or nepotism have intervened in the selection of the family court bench, with the result that mediocrity has become all pervasive. A system of nomination by a representative, disinterested board followed by appointment by the Lieutenant Governor in Council would do much to eliminate this abuse.

The family court judge is a man with unique responsibilities on his shoulders, responsibilities that demand a full knowledge of the situations being determined. He should not come to his task armed solely with a knowledge of the law. Understanding and tact must be a part of his makeup, and he should at least be acquainted with the fundamentals of the social sciences, if for no other reason than to improve his patience with avid young social workers."

And see text to footnotes 567 and 568, supra.

594. See text to footnote 588, supra.

595. See text supra, at p. 658-659.

596. Compare Civil Code Revision Office, Working Paper on the Establishment of a Family Court in Quebec, January, 1973, Recommendation 25, text to footnote 574, supra.

597. Compare ibid., Recommendation 10, text to footnote 573, supra.

598. See text supra, at pp. 202-203.

599. See text supra and infra.

600. U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at pp. 103-106.
601. Elizabeth D. Dyson and Richard B. Dyson, "Family Courts in the United States" (1968) 8 J. Family L. 505, at pp. 570-571.

But see Judge Paul W. Alexander, "The Family Court of the Future" (1952) 16 Fred. Prob. 24, at p. 29:

"Most important, the court would require a specialist judge or judges. No court can be expected to rise above its judge. No matter how able a lawyer he may be or how filled with the spirit of altruism, he will have to school himself in quite a number of fields of learning and disciplines for which his legal training and experience have not prepared him. Among these are social casework, counseling, diagnosis and therapy, several branches of psychology (especially so-called abnormal psychology), penology, criminology, the basic principles of psychiatry, child and family welfare, a little medical case-work, and community organization."

602. Report of Royal Commission Inquiry Into Civil Rights, Ontario, 1969, Vol. 2, Ch. 40, Juvenile and Family Courts, at pp. 562-563. See also ibid., at pp. 589-590, citing Shirley D. McCune and Daniel L. Skaler, "Juvenile Court Judges in the United States" (1965) 11 Crime and Delinquency 121, and Professor Monrad G. Paulsen, "Juvenile Courts, Family Courts and the Poor Man" (1966) 54 Calif. L. Rev. 694:

"McCune and Skaler comment:

'The fact that Juvenile Court work is a "minor" responsibility in most jurisdictions may be interpreted as indicating that the job can be adequately done on a part time basis. Perhaps a more realistic assessment, however, would be that although the philosophy of the Juvenile Court has achieved universal acceptance, it has been integrated into the existing judicial structure without recognition of the complexity of the job assignment.'

They continue:

'Is legal education alone sufficient for

adequate functioning in the role of Juvenile Court judge?...The importance of behavioral science to the work of the court is unquestioned. It would be unreasonable to expect that the judge, vested with ultimate decision authority in "treatment" determinations, should not have at least enough familiarity with the field to be able to assess and understand the diagnostic and treatment recommendations of his behavioral science experts (psychologists, psychiatrists, probation officers).'

The authors were commissioned to conduct a research experiment by the National Council of Juvenile Court Judges. They point out that one of the features which differentiates a judge of the juvenile court from a judge presiding in any other court, is that the juvenile court judge is required not only to adjudicate on the guilt or innocence of the child, but also to prescribe treatment for him. McCune and Skaler say:

'To discharge this function...the judge, in addition to applying legal expertise, may be called upon to perform the duties of an administrator, a re-habilitation expert, a community organizer....The judge...remains the caretaker of the system and retains ultimate decision of authority, on both the adjudication and the treatment level.'

...In another article, Professsor Paulsen comments upon the qualifications for a juvenile court judge:

'Arguments for the creation of a specialized Juvenile or Family Court always bring out the point that the cases which come to these courts require a judge with special training and understanding. At the very least, the judge should be able to use expertly the social and psychological information which his staff gathers for him. Making the point real is still a dream in almost every court. By and large, special experience is lacking, politics still plays a major role in judicial selection, understanding and mutual confidence between the judges and the court staff are

often absent. In many courts the judges are not specialists at all...'"

See also Judge H.A. Allard, Family Courts in Canada, in D. Mendes Da Costa, Studies in Canadian Family Law, Ch. 1, at pp. 25-26:

"The profession claims judges should be lawyers, yet legal training alone does not give competence or even an identification with the work and issues of the Juvenile and Family Courts. The McRuer Commission suggests:

'Legal training is not enough. This is an area in which the Continental system of appointing judges should be followed. There judges are trained as career judges. They are not appointed from the bar as in Canada. Experience in the actual practice of law is not likely to be of much value to a juvenile and family court judge. Nor will years of training in commercial, corporation and property law assist him. A special training course should be established in at least one university in Ontario at which students could get training in all those branches of law and the social sciences required for the good administration of juvenile and family courts. Following their graduation the students should be required to serve as probation officers in these courts for at least five years. Following this service, they should be eligible for appointment as juvenile and family court judges.'

Such appointments would not likely find favour with the legal profession especially if proposals for expanded jurisdiction are to be implemented. Most Family Court judges, whether lawyer or of some other professional background, feel confused by their role; they are pressed to avoid the traditional narrow judicial function and are expected to be knowledgeable of community welfare resources, to support worthy causes and to be administrators."

Compare Ontario Family Law Project, Vol. X, Family Court and Social Services, 1969, at pp. 241-245:

" It is a major policy consideration behind these recommendations that a family court system should be created which would have the potential to become a very progressive and developing organization. This means that there must be good opportunities for the continuing education of the personnel of the system to keep them informed as to current thinking and research.

The Family Law Project recommends that a quite wide interpretation should be given to the concept of 'continuing education', including matters such as study and sabbatical leave for personnel, as well as liaison and contacts with other countries.

It is also recommended that inter-disciplinary courses of training, specially adapted for family court judges, should be established at at least one university in Ontario. The courses ought to cover subjects in social science as well as in law, and be adapted to the interests and needs of the students, with, in certain cases, a greater emphasis on law than on social science or vice versa, so as to supplement a student's previous background.

In addition, it is recommended that research should be promoted and conducted within or in relation to the family court system.

In this whole area of research and training, those concerned with the operation of the family court system should have the facilities to keep up-to-date with new developments and thinking in other countries. ...

It is clearly of great importance to the efficient working of any provincial family court system that the family court judges should have a high standard of training, both as to qualifications for initial appointment and also subsequently to appointment. This training should cover not merely legal subjects but also related disciplines such as social science. As has already been suggested, there should be adequate facilities for further education of the judges subsequent to appointment. Indeed, in some ways, this might be considered more important than pre-appointment qualifications, particularly with reference to disciplines other than law and new developments and research relevant to the work of the family court. ...

The Provincial Courts Act, 1968 also provides in section 7 for a Judicial Council for Provincial Judges. One of the functions of the Judicial Council is to make recommendations on the appointment of Provincial Judges. The Act does not lay down any qualifications of a mandatory nature in regard to appointments of family court judges. The McRuer Commission on Civil Rights proposed qualifications for family court judges which were: five years as a probation officer, in addition to training in the law and social sciences, prior to being appointed. The Family Law Project, however, prefer to leave the question of qualifications more flexible as it is felt that rigid conditions might hamper recruitment. It will not be easy, in any event, to obtain the required number of persons for appointment as family court judges under the scheme herein proposed, ie., persons having good qualifications in law, as well as training in social science or a related discipline. Training at a university (covering both social science and law) and at the Bar Admission Course would extend at least over eight or nine years, and the five years' experience as a probation officer would be additional to this. As previously suggested, qualifications and experience prior to first appointment are not the only desirable form of training, nor perhaps even the most important form of training. There should be continuing study and courses for family court judges after appointment in relevant aspects of behavioural sciences as well as in new legal developments within their field. It has been previously recommended in this chapter that an inter-disciplinary course of training, specially adapted for family court judges, should be established at one university at least in Ontario. The Judicial Council should normally recommend that a person selected for a possible judgeship in the family court system ought to take this course and also do a period as an assistant to a judge in the family court system. This would be the normal route whereby a young appointee would enter the family court judicial service, but, of course, in certain circumstances, and in regard to more mature appointees, the Judicial Council might think it desirable to waive these requirements and to propose that a person be appointed directly to the family court bench."

NOTE: The opinions cited in this footnote and in the accompanying text thereto should be interpreted in light of the conditions prevailing in the Juvenile and Family Courts of Ontario in the late nineteen-sixties. At that time, no professional legal qualifications were prescribed for appointments to the Juvenile and Family Courts. In so far as the Ontario Family Law Project endorsed the concept of a unified Family Court comprised of two tiers, the senior one of which was to be presided over by federally appointed judges, no suggestion was made respecting waiver or relaxation of the current requirements of section 3 of the Judges Act, R.S.C., 1970, ch. J-1, whereby appointees to any Superior Court must be persons of not less than ten years standing at the bar.

603. Report of Department of Justice, Juvenile Delinquency in Canada, Ottawa, 1965, at pp. 132-133, paras. 224-226.

The opinion that judges of a Family Court should receive special training to complement their legal qualifications or expertise has been frequently endorsed. See text to and contents of footnote 602, supra; and see Civil Code Revision Office, Working Paper on the Establishment of a Family Court in Quebec, January, 1973, Recommendations 14, 16 and 17.

See also Family Law Study, Newfoundland, Project V, Family Courts, Final Report, May, 1969, at pp. 10, 18, and 21-23:

" Qualifications of court personnel is of the utmost importance, and care should be used particularly in the appointment of judges. It would be helpful to have judges who are trained in the behavioural sciences - or at least to have judges who have some bent towards family problems. ...

a. There ought to be specially trained judges in family law throughout the province of Newfoundland.

b. With the appointment of specialist judges (i.e. judges with legal training and knowledge of or training in the behavioural sciences) the jurisdiction of the family court should be broadened to include ideally, all aspects of family law. ...

At the present time the bulk of family law cases which reach court are handled in magistrates' courts. The magistrates for the most part are trained in neither law nor the behavioural sciences. Many of them may be sociologically oriented, but are not trained. The judge of the family court situated in

St. John's is a lawyer and has bent towards the behavioural sciences. It may be safely concluded that the present magistrates' court are not suited to adaptation to the family court system that has been outlined here. ...

Ideally, the court to handle family law problems would be the Supreme Court of Newfoundland. The best system would be to appoint specialist judges to preside in a Family Court Division of the Supreme Court. ...

All judges of the family court should be lawyers with additional training in the behavioural sciences if at all possible."

And see Ontario Welfare Council, Brief to the Ontario Law Reform Commission, in Proceedings of The Special Joint Committee of the Senate and House of Commons on Divorce, Ottawa, March 14, 1967, at p. 1372:

"Judges of juvenile and family courts are selected by provincial authorities. No professional qualifications are, by law, required of persons appointed. We believe that legal knowledge is necessary to enable a judge to perform his functions properly, but that a background of social and behavioural sciences and knowledge of resources available to the court is equally important. Recognizing that it would be difficult, if not impossible, to combine these in one individual, the report of the Department of Justice on Juvenile Delinquency in Canada has recommended that a specialized program of training be made available to judges."

For a description of a recently implemented training program for judges of the Provincial Court (Family Division) of Ontario, see Chief Judge H. T.G. Andrews, "Proposal for Judges' Training Program", November 10, 1972.

Compare Recommendations of the Special Committee of the Association of the Bar of the City of New York, March, 1954:

"10. A new judge should go through a period of conscious preparation before he himself presides over the courtroom and gives leadership to the court's staff. He should, as a minimum, sit with an experienced judge for considerable length of time, discussing rather

than deciding the cases that are presented. He should also know some of the professional thinking and literature that bear on the court's work. He should see the places to which children may be remanded or committed, and should become aware of the objectives, problems, successes, and failures of all those who are the court's collaborators in dealing with children and parents."

See also Lindsay G. Arthur, Administrative Judge of the Juvenile and Domestic Relations Divisions of the Fourth Judicial District Court of Minnesota, "A Family Court — Why Not?" (1966) 51 Minn. L. Rev. 223, at p. 230 and footnote 10:

" A Family Court is, by definition, created to handle the most sensitive problems of human relationships. As a court of law, it must be knowledgeable in the entire range of procedural law as well as in complicated areas of substantive law. As a court supported by a staff of social workers, it must be versed in the methodology and philosophies of that discipline and the related disciplines of psychology and correction. In metropolitan areas it will be involved in administrative and personnel problems though properly only on a supervisory basis. Thus, of all things, the judge of the Family Court must be well-trained. Since it is politically naive to think that he will be thus trained before his accession to the bench,¹⁰ the necessary training must come after appointment."

For consistency, the Family Court requires a dedicated as well as a well-trained judge. Necessarily, then, the judge must be free from other assignments and must be guaranteed a continuity of the Family Court assignment. A rotating system of judges will ensure both lack of training and lack of continuity. ..."

"10. Since the skills required to be a good juvenile or family court judge are not taught in law schools and the judge's primary discipline must be law, he can only learn the rest of what he needs to know *after* he becomes a judge. To do this, he must have time, an intense interest in his field of work; and only a full-time juvenile or family court judge can possibly have this time, interest, and opportunity.

NATIONAL COUNCIL ON CRIME & DELINQUENCY, *A System of Family Courts for Louisiana* 52 (Survey 1961)."

And see Conference of Conciliation Courts, Model Conciliation Court Law, May, 1968, section 9 and accompanying footnotes:

"9. (Actual and necessary expenses) Actual and necessary expenses of employees of the court incurred while in the discharge of the duties of their office shall be reimbursed by the county in accordance with its regulations for such reimbursement. Necessary expenses include, in addition to local travel, dues for membership in professional organizations with the concurrence of the Court, and travel, meals, lodging, and fees for the attendance of seminars, workshops, and conferences, including out-of-state conferences,⁵ as the judge of the conciliation court may direct or as he may be directed by competent authority.⁶"

"5. Such conference of judges, hearing officers, marriage counselors, and consultants should in general apply to a broad geographical area, so as to include a professional group of sufficient size to introduce many viewpoints and varied practices. To meet this felt need, the Conference of Conciliation Courts has an annual convention for the purpose of improving the services and techniques of conciliation courts. The Conference, which began in California, now has member courts in several western and mid-western states, and has proved to be an effective medium for the exchange of ideas between courts and between professions. This annual convention of the Conference of Conciliation Courts illustrates the basis for authorizing out-of-state travel. Attendance at this convention should in general be in addition to, not in lieu of, attendance at meetings appropriate to the profession of the individual staff members, i.e., judicial conferences, bar associations, psychological associations, and associations of marriage counselors.

6. If there exists in any state an authority charged with responsibility for coordinating the practices of the courts of the state, as for example California's 'Judicial Council', the cooperation, support and guidance of that body may facilitate the conduct of state or regional conferences, and should be enlisted."

604. University of Birmingham, Institute of Judicial Administration, Family Courts: Comments on a Paper prepared by the Family Courts Working Party of the Law Commission, April, 1972, at p. 10 para. 29.

Compare P.J.E. Cole, "Family Courts — Their Nature and Function" (1971) 4 Man L.J. 317, at p. 335:

"Since it is politically naive to think that a judge will be well trained before his accession to the bench, some provision will have to be made for the necessary training after appointment. The Ontario Law Reform Commission recommended that inter-disciplinary courses, specially adapted for family court judges, be established at a university, covering both law and the social services with the emphasis on either depending on the particular judges strengths and weaknesses.

The basic aim is to create specialist judges, whose work is concentrated solely in the area of family law, and if rotation of these judges is necessary because of a widespread and sparsely populated jurisdiction then it should be done slowly and entirely within the family court structure. In one family case in Washington, D.C. hearings were heard before ten different judges before the whole case was completed.

While all of these provisions are intended to produce competent and informed judges, the realistic view is that complete success will be infrequent at best. Therefore consideration should be given to the possibility of having the judges sit *en banc*, as was suggested in a British White Paper, Social Work and the Community. The drawbacks of course would be possible intimidation of the parties to a case being heard, and the strain that would be put on the available judicial personnel who are stretched pretty thinly already considering the backlog of cases that has piled up in some courts."

605. See Honourable Otto Lang, Minister of Justice, Address to Canadian Judicial Seminar, 1971:

" In the great majority of cases, a judge's pre-appointment legal training does not qualify him to perform the wide range of duties which are imposed on him by the system. In practice, he might have shone very brightly

in one or two areas of the law, but have done practically nothing in other areas. A large part of what he learned at law school he will have forgotten....Certain areas of the law, over which he will have jurisdiction as a judge, he will never have learned in law school or in practice."

- 606. U.S. Department of Labor, Children's Bureau Publication 193, The Child, The Family, And The Court, Washington, 1929, at p. 36.
- 607. U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at p. 105.

Compare Report of The Governor's Commission on the Family, California, 1966, at pp. 10-11:

" The competent handling of family problems requires that the judge have particular specialized skills, and the Commission believes it vital to the proper functioning of the envisaged system that the judge have an appointment of sufficient length to enable him to develop these skills. Reassignment of judges, say every six months cannot provide the continuity of direction which underlies a successful Family Court effort. We therefore recommend that assignments of judges to the Family court should be for not less than two years."

And see Maxime B. Virtue, Family Cases In Court, 1956, at pp. 48-49:

" In so far as the immediate problem is concerned, it is now felt by the judges of the San Francisco Superior Court that decretal hearings in divorce matters have to be handled by judges on general assignment for these reasons:

(a) They must be handled promptly, and since there are so many of them, the only way to do it is to shuffle them into the docket on a daily basis, using several judges.

(b) Judges like to share the fee awarding power of the divorce judge.

(c) Divorce cases are so troublesome because of their emotional content that no one judge or group of judges wants to be assigned to a docket

composed exclusively of such cases. Of this last, an experienced family court judge comments: 'Fine for the judges, but what of the litigants and the children? The judges' distaste for divorce and family affairs appears to be what prevents assigning a certain number of judges to work full time continuously, without rotation, to the domestic relations division. Which is paramount: the preference of the judiciary or the welfare of the litigants and families?'

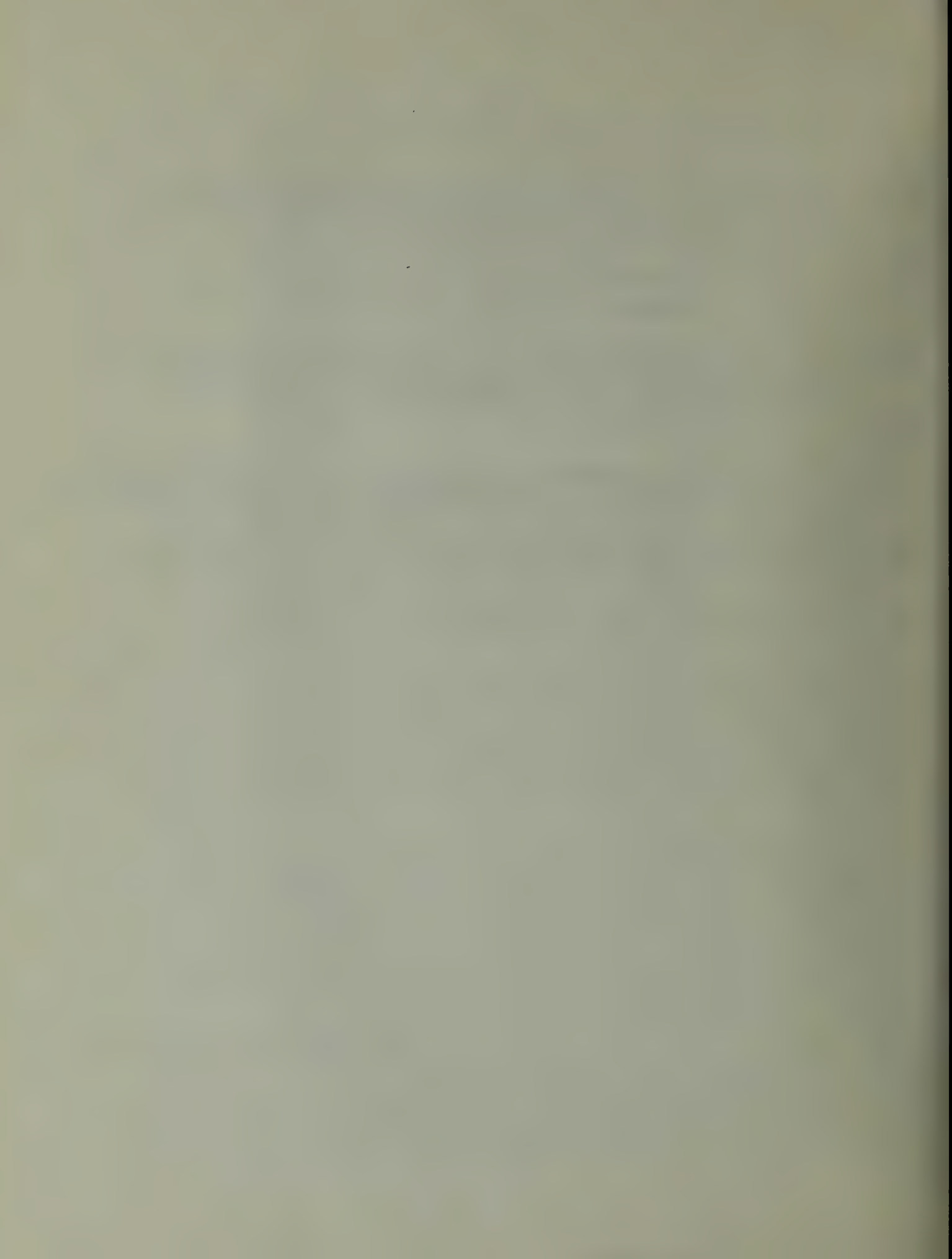
For reasons already mentioned, it is felt that an adequate domestic relations department could be set up, without incurring any serious disadvantage to the court, by any of several methods:

(a) Make investigations by the domestic relations staff a condition precedent for decretal hearing in all cases involving children, using a routine questionnaire to develop financial information and factual background for child care. Such reports, and the further evidence of the investigator if stipulated, could then be routinely available to the judge throughout all phases of the litigation.

(b) Set up a specialized domestic relations docket to include all phases of divorce and bastardy litigation, with the present domestic relations judge as presiding judge of the docket. He could then assign various hearings to other judges on general assignment by arrangement with the presiding judge of the court.

(c) As a variation of (b), several judges could be assigned for a period of time to the domestic relations docket, to work with the domestic relations presiding judge, subject to the over-all authority of the court's presiding judge to call on all his man power as needed. The continuity of approach imparted by special knowledge such judges would gain might prove, in practice, to result in improvements which would more than off-set the disadvantages of such specialized assignments. This bank of domestic relations judges could rotate on some basis, to be worked out by all the judges, which would provide for continuity without constituting a life sentence for any judge. Similarly, a commissioner might be assigned for permanent duty to this department."

- 608. U.S. Department of Health, Education and Welfare, Children's Bureau Publication 437-1966, Standards for Juvenile and Family Courts, at pp. 105-106, footnote 179.
- 609. See text to footnote 588, supra.
- 610. See text to footnote 573, supra.
- 611. Brief of the Pastoral Institute of the United Church of Canada, Proceedings of The Special Joint Committee of The Senate and House of Commons on Divorce, November 22, 1966, at p. 425.
- 612. See text supra, at p.658.
- 613. See text infra, re security of tenure. The conclusions expressed in the text respecting re-assignment of judges could not presently, and are not intended to, include referees appointed to the court.
- 614. See text supra, THE STATUS AND STRUCTURE OF THE FAMILY COURT.





LAW COMMISSION

FAMILY COURTS WORKING PARTY

1. In August 1971, the Law Commission set up a Working Party to consider what kind of court, below the level of High Court, should deal with family matters. The present document is issued by the Working Party to inform interested persons and bodies of the issues under consideration and to invite them to give information and views on some of the questions at present being considered.
2. We have, at this stage, made a tentative and somewhat arbitrary classification of the expression 'family matters' used in our terms of reference. Our present thinking is that the expression should include: consents to marry; divorce, nullity, judicial separation and ancillary relief; presumption of death and dissolution of marriage; declarations of status (legitimacy, legitimation and validity of marriage); magistrates' matrimonial orders; maintenance during marriage; alterations of maintenance agreements; family provision on death; property disputes during marriage; occupation of the matrimonial home; wardship; guardianship; adoption; affiliation. It should not include any criminal proceedings or proceedings arising from offences by children and young persons. No view has yet been formed as to whether it should include certain other matters such as: care proceedings; summonses under the Ministry of Social Security Act 1966; torts between members of a family. This classification is by no means final and we therefore invite views on the question:



What are the family matters with which a family court should deal?

3. Our provisional classification of family matters is heavily influenced by the present substantive family law and jurisdiction of the courts. It is not part of our task to consider and make recommendations on the substance of family law itself, but we must consider the function of family courts in relation to family law. We therefore do not preclude extension or limitation of our provisional classification should views change about the social purpose and scope of family law. Bearing this in mind, we must consider what is the best method of dealing with family matters. We are aware that some people believe that the courts should be excluded from the administration of the law relating to family matters or, at most, should be concerned only with such questions as property disputes or defended divorces. We therefore pose the question:

To what family matters, if any, should the process of adjudication be applied?

4. Assuming that there is a role for the courts in at least some family matters, what relationship should there be between the family court (whatever its form) and the social welfare services (including social security)? There are two approaches to this question:

(a) Should a family court be part of a new social welfare organisation providing all family



services, including adjudication?, or

- (b) Should there be a family court with the primary role of adjudication and with a clearly defined welfare responsibility?

5. . If approach (a) is chosen, one of two consequences would appear to follow:- Either

- (1) the family court would be responsible for the provision of all social services whether or not there was a dispute; or
- (2) the family court would be a subordinate part of a large social welfare organisation.

Is either of these consequences acceptable?

6. If approach (b) is chosen:

- (a) What should be the extent of the court's welfare responsibilities? Some welfare questions arise in the course of adjudication; should the court also be concerned with other welfare questions such as counselling and reconciliation?
- (b) What welfare services should the court have in its own control and to what extent should it rely upon links with other welfare agencies?

7. What should be the place of a family court system within the present system of courts?

- (a) Should there be a wholly separate and distinct specialised system of family



courts, manned by specialist judges with specialist staff, housed in its own buildings and with its own procedures including enforcement? or

(b) Should family courts be part of the general court system?

8. If (b) is chosen should family courts be incorporated into 1) the magistrates' courts system, or 2) the county courts system? It is clearly possible that in either of these systems a place could be found for the family court. It is also possible that family courts could be established in 'circuit centres'. We would welcome views on this.

9. How should a family court be constituted?

(a) Should it include lawyers, laymen or experts in the social field or a combination of these?

(b) Should members of the court have special training or experience?

(c) Should it be differently constituted for different purposes? If so, which type of court would be best qualified to deal with the various items of jurisdiction (listed in paragraph 2 above)?

10. If there is more than one type of family court how should business be allocated? Should matters involving complicated questions of law be in the exclusive jurisdiction



of the Family Division of the High Court? If so, how are these matters to be identified?

11.. The above questions assume that the present system of dealing with family matters is in some way inadequate. But is there, in fact, any general public dissatisfaction with the ways in which family matters are now handled by the present system and, if so, what are the features which give rise to it?

12. The Working Party has reached no final views on any of the matters canvassed in this paper and would welcome information, views and comments not only on the questions specifically put but on any related issues. It would be helpful if those consulted could give brief reasons for their views and, though this is by no means essential, formulate them, as far as possible, within the framework of the questions. We would be grateful to receive communications by 31 March 1972. They should be addressed to:

Miss H. Galas
Law Commission
37/38 John Street
Theobald's Road,
London, WC1N 2BQ.

Submission of Trial Division of the Supreme
Court of Alberta: Re Institute of Law
Research and Reform, Alberta, Working Paper,
Family Court, April, 1972



HONOURABLE J V H MILVAIN
CHIEF JUSTICE
TRIAL DIVISION

JUDGES' CHAMBERS

THE SUPREME COURT OF ALBERTA

Court House,
Calgary, Alberta.
T2P 1T5

August 31, 1972

Institute of Law Research and Reform,
University of Alberta,
Edmonton, Alberta.

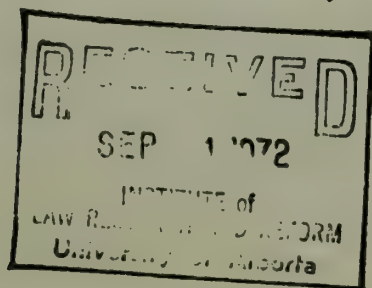
Dear Sirs:

Re: Family Court

The members of the Trial Division gave consideration to your working paper at two meetings, one in Jasper at the time of the Alberta Law Society meeting there and again in Edmonton on August 25th. As you can well understand, it is not an easy matter to get all of the members of the Trial Division together as it is seldom one finds the time when some of them are not working. We felt it best to prepare a single commentary, rather than for each Judge to write in, and our commentary is enclosed herewith.

Yours truly,

A large, stylized handwritten signature, likely of J. V. H. Milvain, written in dark ink.



INTRODUCTION

In a "Working Paper on Courts Administering Family Law", issued April 25, 1972, by the Institute of Law Research and Reform, the Trial Division of the Supreme Court of Alberta has been specifically invited to comment on the proposals made in the document. As the Paper follows a study undertaken by the Institute at the request of the Attorney General of Alberta, the Division believes it imperative to make its views known to the Institute and to the Attorney General.

The Division has examined the Working Paper with certain considerations in mind:

1. In the public interest, it wishes to ensure that the historical and proven role of Supreme Court judges as impartial and independent arbiters between the individual and the state be preserved.
2. Will the members of the public now served by the Division be better served in the way proposed by the Paper?
3. Recognizing the need for reform in many areas of the law touching the family, will the method advanced by the Institute achieve that desirable objective?

Before dealing with the Working Paper in detail, the Trial Division wishes to make some general observations:

(a) It is aware of the social problem involved in marriage breakdown and the consequent erosion of family ties.

(b) Although there are facets of this problem that can be dealt with on a juridical basis, there are many that are not amenable to laws and to court procedures. Clinics rather than courts, education rather than trials, are essential in many areas.

(c) The Division is concerned as to whether or not consideration has been given to legislation in other provinces such as, for example, the new *Family Relations Act* of British Columbia. The Working Paper does not make this clear.

(d) Should consideration first be given to improving the present system rather than embarking on a program of deep-rooted changes to it?

COMMENTS

Page 3, second paragraph:

Is it the function of a court to assume responsibility to maintain the family unit intact? Such a goal is

essential, let there be no mistake about that. But within the framework of our society, is it properly a court's role to become an arm of the state responsible to provide a last line of defence against the breakdown of the family relationship? Is this not more properly the function of others?

Page 4, last complete paragraph:

In examining the extensive recommendations of the Working Paper, one is handicapped by the lack of supporting material on which they are based, including the absence of references to experience in jurisdictions outside Alberta. The paragraph says that the recommendations "are directed to the constitutional and legal structures and the geographical and demographic realities peculiar to this time and place". What are the "demographic realities" involved? What are the unified or integrated Family Courts mentioned, and what is their relationship to the superior courts involved?

Page 4 (bottom) and page 4 (top):

The essential purpose of a court is to administer the law. What areas of substantive law will be the subject of later projects to be undertaken by the Institute? If there are laws requiring modification, can a proper court

system be designed without taking them into account? For instance, the creation of the Family Division of the High Court of Justice in the United Kingdom in 1970 was preceded and accompanied by a whole series of legislative changes, of which the reorganization of the High Court was but a part.

Pages 5 and 6

Areas of law included in the term Family Law:

No reference is made to restraining orders with which the Supreme Court is daily concerned. These orders, designed to prevent physical violence by a husband against a wife and children, sometimes involving the right to occupy the family home, are of great practical concern to women.

Page 6, Item (11):

Is it proposed that judges of the Supreme Court would be involved in matters relating to school attendance?

Page 6, Item C

Paragraph commencing at bottom of page:

It is noted that in Great Britain, where there is no constitutional reason for a division of jurisdiction, family law matters continue to be administered by a system involving Magistrates' Courts, County Courts and the Family Division of the High Court.

Page 19, paragraph at top of page:

The members of the Trial Division do not believe that their determination of family law matters is hindered by the rules relating to opinion and hearsay evidence. Opinion evidence in these matters is heard as a matter of course. Much of the evidence received in these cases could be excluded as hearsay if the common law were strictly applied. The existence of these rules, however, does provide a salutary means by which hearsay and opinion evidence of a flagrant kind can be excluded.

It is true, as mentioned in the paragraph, that privileged communications and irrelevant material are excluded in the Supreme Court. It is difficult to see how this kind of evidence could be accepted in any court or tribunal.

Page 19, constitutional law matters:

The Division does not believe it ought to comment on constitutional law matters.

Page 23, second paragraph:

There is some overlapping in the present system of courts. The proposal of a unified court is only one remedy for this situation. It should be possible to amend the existing legislation to remove most, if not all, of the overlapping.

Page 26, top of page:

The judges of the Trial Division strongly object to the unsupported statement made here, and repeated in varying forms elsewhere in the Paper, that those aspects of family law dealt with in the Supreme Court tend to be the less attractive part of the business of the Bench and Bar in that court. Cases involving divorce, custody and other family problems are important, and, in addition, are often the most difficult and trying that judges must decide. From the care given to these cases, the Division does not share the Institute's belief that they tend to be the less attractive part of the business of the Bar in the Supreme Court.

Page 28, second paragraph:

We are puzzled by the significance of the statement that the Supreme Court "is a rather unmoved arbiter whose duty it is to determine what has happened and to apply legal principles to the facts which it finds". If it is intended to mean that the court attempts to listen patiently to the evidence, to avoid prejudice towards one party or another, and, above all, to avoid assuming the role of an interrogator, the statement is correct. The assertion is incorrect if it implies that members of the

court are insensitive, unmoved by a spirit of compassion in endeavouring to do what is right in the best interests of those concerned.

As mentioned in the Working Paper, it is true that some family law proceedings in the Supreme Court are carried out in accordance with elaborate rules, with a number of preliminary and interlocutory steps being necessary. However, the great majority of these cases are in fact conducted in a much more simple and direct fashion. There is no reason why changes could not be made to the Rules of Court to do away with many of these preliminary and interlocutory steps in cases where their use is creating hardship or is being abused.

As to the rules of evidence, their practical effect in the realm of family law matters has already been discussed (see page 5).

Judges of the Trial Division are generalists, it is true, but not just in the sense that they hear a wide variety of cases. Before their appointment, most of these judges have gained considerable knowledge of the people of Alberta through a wide range of involvement in community and public affairs.

The last sentence of the paragraph says that in the Supreme Court the emphasis is upon the ascertainment

and protection of legal rights. That statement is true. But the nature of those legal rights must be kept in mind. A child's legal rights so far as custody is concerned, for example, is quite simply that his best interests are paramount.

Generally speaking, the entire paragraph appears to describe briefly the Institute's conception of the procedure, method and philosophy applied by the Supreme Court as regards family matters. One has the feeling that the authors of the Working Paper really do not know the procedure, method and philosophy of the court in its day-to-day application to these matters. In point of fact, the overall aim of the Division is to deal with family problems as pragmatically, as flexibly, as sympathetically and as expeditiously as possible. *The Divorce Act* of Canada and *The Domestic Relations Act* of Alberta do not codify the principles to be applied. By dealing with each of these cases on its merits, in the best interests of the wives, husbands and children involved, the Trial Division is trying to preserve an open, flexible approach, and to avoid the introduction of rigidity into the application of these statutes in Alberta by the creation of a body of judge-made law in the form of reported decisions.

Page 29, second paragraph:

Are there statistics available so as to compare the speed with which maintenance and custody matters are handled in the Family and Supreme Courts?

Page 29, last paragraph:

The Supreme Court is anxious to make use of supporting services. The *amicus curiae* approach to custody cases is invaluable when the services of social workers and psychiatrists are reasonably available.

The judges of the Supreme Court welcome any steps which make available to litigants and to the court the help of trained counsellors.

Page 30, first paragraph:

The statement "decisions made with a knowledge of the particular family background and an understanding of the family relationship are likely to be better decisions", raises two questions: Firstly, how is the knowledge of "the particular family background" to be obtained by the judge in the court structure proposed by the Working Paper? Secondly, what is meant by an "understanding of the family relationship"? Trial judges know that their decisions in cases involving some specialized knowledge

they may have acquired before their appointment have not necessarily been better decisions for that reason.

Page 30:

As mentioned in the Working Paper, it is logical to assume that judges whose time is spent entirely, or almost entirely, with family law, would have the best chance of developing the greatest understanding of problems arising out of the family relationship. But it seems to the Trial Judges that other factors are involved as well. As has already been pointed out, they believe it essential to bring to each of these trying cases dispassion, sensitivity and compassion. They wonder if they could continue to do so if faced daily with these matters, and if there might not be a danger that their outlook would become insensitive and mechanical? They ask themselves if a steady diet of these cases would inhibit the court's role in many of the bitterest, of providing a means whereby husbands and wives may unburden their marital problems, often at great length, before a sympathetic, impartial listener.

Page 31, last paragraph:

It is said there is a very strong prejudice, which must be recognized, that a Family Court will inevit-

ably resemble a social agency more than a court of law. What is the reason for that prejudice, if such exists? Is there something in the way that a Family Court is established and operates that creates such an impression? If that be so, will the association of family law with the Supreme Court in the manner proposed by the Working Paper remove that image?

Page 34, last sentence:

The Working Paper says it will provide an opportunity for the final formulation of the views of the Trial Division as to the Institute's preference that the Family Court be a family section of the Division, separate in organization and with specialized judges and a presiding judge, but recognizing the Chief Justice of the Trial Division as its formal head.

The proposal would require all judges of the proposed Family Court to be appointed by the Government of Canada. Assuming such a step to be possible, the Trial Division believes the creation of such a court would not be in the public interest, having regard to the functions the Institute recommends be assigned to it.

One of the historic roles of a judge in the common law system is that of an impartial arbiter between the individual and the powers of the state within the

framework of the law. The philosophy at the root of the recommendations of the Working Paper appears to be that in the domain of family law this historic role will be replaced with something else. The Trial Division believes that the intimate, full-time association of judges, sometimes functioning as interrogators and initiators, with court services such as investigation and "enforcement", will derogate from this traditional role, and this at a time when courts are increasingly condemned as forming part of the "establishment", subservient to the views of the authorities. The Division is opposed to this recommendation.

Page 35, first paragraph:

The Trial Division's views as to this proposal are the same as those set out under the preceding heading.

Page 36, Appointment and jurisdiction of judges:

If provincially appointed judges are to form a part of the Family Court, the Institute recommends that, except for such existing court judges as are not legally trained, and for part-time members proposed for remote areas, provincial judges would be chosen from among lawyers. No need is seen to restrict such appointments to lawyers who have at least ten years standing at the Bar, as is the

case with federal judges. Indeed, having regard to the wide range of problems proposed to be dealt with by the Family Court, and the panoply of services to be provided by it, it may well be impracticable to require all of its judges be appointed from among lawyers of at least ten years standing.

Given the Institute's basic objective of a unified Family Court - in name if not in legal fact - it is probable there will be only one kind of judge associated with the court in the public mind - a Family Court judge, whether a part-time layman in a remote area, a recently-admitted lawyer, or one who has practised for many years before being named a judge of the court.

Formal legal training and standing at the Bar continue to be a requirement of the Parliament of Canada for the appointment of judges to the superior provincial courts. The Trial Division believes it would not be in the public interest to have its members form part of a court where the standards for judicial appointment were not uniform.

Page 51, first paragraph:

It is logical to assume, as postulated in the report, that if judges give their full attention to one

field they will become more efficient. However, the Trial Division does not believe it necessarily follows that specialist judges in the field of family law will necessarily be better judges, and that their decisions will necessarily be better decisions.

This point is also dealt with in the comment relating to p. 30 of the Working Paper, to be found at page 9 of this submission.

Page 51, Appeals:

The Trial Division strongly believes that there should be an appeal to the Appellate Division from all types of decisions.

Page 66, Supportive services:

The provision of supportive services in the field of family law is essential. As this portion of the Working Paper points out, it is the relation of the services to the proposed Family Court - or to any court - that is the crux of the matter. If the full range of support proposed by the Institute, including particularly legal aid, were made available and used as recommended in the Working Paper, the Trial Division's primordial concern that it not become, or appear to become, an arm of the state, will largely be removed.

The Division believes it essential that no kind of Family Court involving its judges should be created without the establishment at the same time of supporting services organized in the manner proposed by the Working Paper being assured.

Page 97, paragraph commencing at bottom of page:

Comment is invited from the judiciary as to the number of full-time judges of the Trial Division that might be needed to deal with divorce and other family matters. It should not be overlooked that in addition to hearing non-contested divorces, trial judges also deal with a large number of contested divorces and custody applications. A substantial portion of weekly and daily chambers applications heard by the Trial Division involve maintenance, custody and restraining orders, and their variation.

The Division estimates that the full-time services of from three to four judges of the Supreme Court would be required to handle the family law matters with which it now deals.

As a matter of practical concern, it is common for a trial judge to find he has been assigned family law cases - particularly non-contested divorces - involving

persons with whom he is acquainted. As matters now stand, arrangements can be made on the spot for the case to be heard by another judge. This sort of situation would create considerable practical problems if a limited number of trial judges were occupied full-time with these matters.

CONCLUSION

In summary, the Trial Division is of the opinion that the manner in which family law is now being dealt with has faults. Changes to correct these must be made. The Division is opposed to a precipitous plunge into a new system, because, in its opinion, the Working Paper does not give any assurance that its proposals, if adopted, will achieve the desired result. Without such assurance, the adoption of the radical changes proposed in the Working Paper should not be carried out.

Milvain C.J.T.D.

O'Byrne J.

Primrose J.

MacDonald J.

Greschuk J.

Sinclair J.

Riley J.

Cullen J.

Manning J.

Lieberman J.

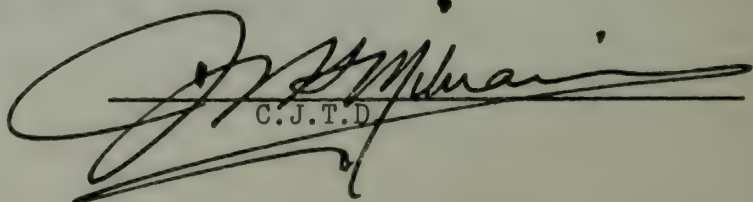
Kirby J.

Bowen J.

Dechene J.

Moore J.

For the Court



C.J.T.D.

Submission of Calgary Bar (Family Law
Sub-section of Canadian Bar Association:
Re Institute of Law Research and Reform,
INTRODUCTION Alberta, Working Paper, Family
Court, April, 1972.

This paper evolved from a meeting of the members of the Calgary Bar who are connected with the Family Law Sub-section of the Canadian Bar Association. This meeting was held as one of the regular meetings of the Sub-section in Calgary in September of 1972. At a subsequent meeting it was suggested by the participating members of the Calgary Bar present that the writer undertake the authorship of a critique of the Institute's working paper in the Unified Family Court and the following comments are the result of such undertaking.

The author would like to thank the following members of the Calgary Bar who assisted in delinating the views of these members, which views we hope express the thoughts and feelings of those persons of the Calgary Bar keenly interested in Family Law matters. In particular the writer would like to thank His Honour Judge Allard of the Juvenile Family Court at Calgary, Doug Fitch, Doug MacLeod, the late Harvey Chitter, John Soby and Peter Vallance for their assistance. This report is more than the author's views, it is a compilation of the viewpoints of the other named gentlemen and hopefully representatively, the Calgary Bar in general.

As Chairman of the Family Law-Subsection for the Canadian Bar Association in Alberta, I very much would appreciate hearing from the Institute as to their reaction to our critique and their future proposals as we are very much interested in

keeping a watching brief on developments in this area.

The following report is of three parts. The first part is expressed herein as we thought the Institute would be interested in hearing the "gut reaction" of the practicing bar who met at Calgary in September. Subsequent to that meeting discussions were had between members of the practicing bar interested in Family Law on an intermittent basis and through these meetings parts two and parts three in reality evolved. There is an obvious correlation between parts one and two and this is so because the majority of those who turned out for the meeting in September are those who are most keenly interested in Family Law in Calgary and developments in Family Law.

PART I

Comments of the Calgary Bar at an open meeting to discuss the Institute of Law Reforms Working Paper on the Unified Family Court, September, 1972.

Initial comment by those present with working knowledge of the paper was that it was simply a rehash of earlier reports. It appears to reflect a "library research" approach to the problems of family law and the Unified Family Court. There was a clear consensus that the authors of the paper had no real feel for the day to day workings of the existing court structures dealing with family law. The view was expressed that the existing Courts are doing more than an adequate job at present of handling family law matters. It was appreciated by all however that the time is shortly coming that the sheer volume of cases in the family law area in our Courts will force a revision of the existing structures to better handle the work load.

It was agreed that the paper made too many blanket statements and assumptions without adequate argument to substantiate such statements or positions.

The paper as well appears to assume that it is only the Family Court that can adequately handle the problems of the family which in turn appears to assume that there is a substandard difference now between the Family Court and other Courts and in particular the

Supreme Court of Alberta. This underlying philosophy is thought to be both questionable and fallacious.

The meeting also reached a consensus on the constitutional problems, i.e. the division of federal and provincial legislation jurisdictions, by assuming that this would be worked out between the provinces and the federal government if the Unified Family Court was to come into reality.

The discussion then turned to the main thrust of the paper, that is to say should there really be one Unified Family Court and if so, should it be a one tiered or two tiered Court. A consensus could not be reached on these points. Nor could a majority view be reached on whether or not the basic philosophical stance of the Courts should be altered from an adversarial one to one to include the investigatorial and conservatory function.

That one division Court argument fails to appreciate it seems the great work load of cases carried on by the Courts. There appears to be some justification in reading the report to state that the report has not really discussed other areas of family law where lawyers do not actively participate, namely the child welfare cases, both in District and Family Court, affiliation cases, maintenance recovery cases with regard to these matters and juvenile cases. Looking at statistics which were produced by His Honour Judge Allard of the Family Court of Calgary it appears that cases in the Supreme Court reflect only approximately one-

third of all family law matters. The thought was expressed that if the Supreme Court was to be the sole jurisdiction to handle family matters it would obviously have to handle bicycle by-law infringements. Obviously trivia may be constantly blended with the important and there was some feeling that the Supreme Court would not want this to occur. By looking at statistics gleaned from the Calgary Court records it appears that the sheer volume of cases may very well render the one tiered Court as suggested, i.e. the one tiered Court forming part of the Supreme Court, impractical.

The two tiered system, i.e. a partial provincial and partial federal Court did not garner majority support because it seemed to be over-complicating the Court structure, which was something to be avoided. The consensus was that if there was to be a revision of the Court structure itself it should be a major revision to make the Court a simple Court to approach both for the litigant with Counsel or the litigant who has not the benefit of Counsel.

Ultimately the proposal that appeared to garner the most support insofar as a Court structure was concerned was the following proposal:

- (1) A Court of first instance with total jurisdiction in all Family Law matters but being basically a Court of summary procedure.

- (2) An Appeal Court which would invoke the Trial De Novo Appeal procedure much akin to the Trial De Novo procedure in District Court at the present time in certain criminal matters
- (3) A final appeal to the highest Court of the province, being the Appellate Division of the Supreme Court of Alberta

The hallmarks of this proposal was that the Court of first instance was to be a Court with a simple procedure, readily available to all and able to handle family law matters quickly with minimal costs. It was felt however that the expertise of the Supreme Court of Alberta, Trial Division, should be made available in the form of a Trial De Novo appeal. However, it was felt that the Appellate Division of the Supreme Court of Alberta should still be the Court of last resort in family law matters and the procedure for appeal should be unchanged from its present mode. It was felt that this proposal would have inherent in it checks and balances which would insure a uniformity of approach in family law matters but also reducing costs to the litigant at least at the lower levels.

The final comment of the group meeting was perhaps the Bar was not aware of deficiencies in the present system, that is to say they realize that the members of the public at large may be able to enunciate deficiencies which are not obvious to them

and in this regard they welcome the suggestion that before any final proposals for change are struck, public hearings should be held throughout the province on the proposal that all interested parties may be heard.

PART II

Critique of the Working Paper

In this brief we are trying to reflect the views of the practicing bar in the City of Calgary and as the working paper appears to suggest radical changes in some areas of Court structures and procedures we have examined the report with a critical eye.

The first major criticism of the working paper is that it deals with structures and administrations of Courts and does not concern itself with possible alterations of substantive law dealing with the family. In our view this may be putting the cart before the horse. Many of us who enjoy a substantial matrimonial practice in this City often find we are limited not so much by the different Court systems (for perhaps one's skills will enable us to forego this) but rather by the limitations in the substantive law.

In fairness to the Institute many of us are aware that this area of law is being investigated by the Institute. However

we do also feel that until we can couple the model Court suggested by the paper with reform of the substantive law, much of what the Institute has done will have little relevance. We strongly feel, as practitioners that many of your criticisms of the existing structures really do not exist to the practicing bar and it is for this reason that we criticize the report and make this plea for substantive law reform.

We have now said that for many of us the criticisms which you enunciate, i.e. the problems of the adversarial system, the fragmentation of jurisdictions, the time element, the cost element, the lack of unanimity of philosophy, do not exist to the practicing bar. Perhaps it is more accurate to say they do not cause difficulty. This can be reflected best perhaps by indicating to the Institute the general lack of concern of the bar in general to the working paper. Enthusiasm towards the report does not run rampant through the bar. There does not appear to be cries from the bar for a reform of the present structures.

Although this may be due in part to (a) an apathetic bar, (b) the fact that the majority of lawyers do not carry on their practice actively in Court but rather with solicitors' type work, and (c) those who deal in the Barristers side of things do not carry on substantial family law practices, it is strongly

felt that our present Courts do an outstanding job of carrying the work load of family law matters, with dignity, dispatch and with minimal cost to the litigants.

This leads us to our second major criticism.

It appears clear to us that the authors have more of an academic approach than a practical one and we would ask that they take a pause and reflect on the everyday workings of the existing systems before launching their final report. We feel on balance that the present system is working and working well. While this does not mean that we should avoid trying to improve our Court structure, it does seem to us that the Institute has failed to articulate the inadequacies of the present system so that the practitioner can accept the need for radical reform.

This criticism can be carried forward into three main areas. Firstly, it appears to us that the Institute has made a decision that the adversary system is both inadequate and inappropriate in the resolution of matrimonial disputes. Secondly, the Institute feels that the Supreme Court of Alberta and the bar at large is both disinterested and not philosophically suited to the resolution of family law matters. Thirdly, the Institute feels that fragmentation of the existing family law jurisdictions is such that family law cannot be adequately administered by the present structures.

Where is the supporting material for these general statements? Although we are paraphrasing the report we feel these are hallmarks of the Institute's case for reform. We would like more than just general statements of principles before we are convinced of the need for the radical changes that are suggested.

While it is true that we, the practicing bar use the adversary system, it does not follow that we are slaves to it. While it is true that there are rules of procedure which can be described as elaborate (though complete would perhaps be a more accurate description) at least we do have rules. While it is true that there can be interlocutory procedures in our Courts, this is not necessary in every case nor is it in fact common practice. While we have laws of evidence, are not the litigants entitled to equal protection before the law, which these rules give them, in any Court or should these rules of evidence be altered as well? In short, we find the second paragraph on page 28 of the working paper to be wholly objectionable.

Surely it seems to us that the Institute, before it can opt for the Unified Family Court and alter the basic philosophy of our Court system should demonstrate clearly the shortcomings of the present structure and the benefits to accrue to both the bar and society at large of the Unified Family Court. There seems to be an implicit assumption underlining the whole working

paper that the Supreme Court of Alberta cannot handle the situation adequately now and only a Unified Family Court can. What is so much better about the Family Court? We feel that the Institute has the existing Family Court structure firmly entrenched in its mind when it came to the drafting of the working paper. We feel that the Institute wishes to embellish the present Court structure and enlarge its scope and powers.

Perhaps this is unfair. Perhaps the Family Court should be enlarged. Perhaps this is a good thing. However, we feel that there is a total lack of material in the within paper to justify any of its proposals. This is clear to us when the report says (at page 26 and page 34) that family law matters are the less attractive and desirable parts of the business of bench and bar. Not so! This is also clear to us when it says (at page 24) that a very serious problem is the fragmented jurisdictions of the Courts. Not to the Calgary Bar! Although there will always be some forum shopping given this option, this is not a characteristic of the practicing Calgary Bar. Finally we wonder what is deficient about our Supreme Court philosophy? Much of what the report criticizes puzzles us as it seems to constantly harp on bland generality. This does not sway us to the proposals made later in the Report.

In short there is a lack of hard evidence to substantiate much of what the Institute proposes. The present Supreme Court appears to us to attempt to carry out its work with an open and flexible mind, not hidebound by precedent and with a complete lack of formal rigidity. Nothing could more clearly put this in proper perspective by noting the lack of judge made law in Alberta with regard to both the application of the Domestic Relations Act and the application of the Divorce Act in this province. For example, how many cases can one recall in Alberta reported in the Law Digest dealing with the s. 3 d of the Divorce Act, that is to say the cruelty - only four.

We therefore feel that before the present structure should be destroyed and supplanted with anything else more careful consideration should be given to the present structure itself. It should be remembered that the theoretical problems of fragmented jurisdictions can be resolved in large measure by a simple stroke of the legislative pen. More Courts and more Judges and greater Legal Aid assistance might resolve many of the suggested difficulties. There is at present no hostility by the bench to use when necessary supportive services. We raise these points as we feel that though the working paper does not strongly articulate it, the paper feels

that our present approach to family law should turn from its present form to any inquisitorial and conciliatory process which we feel is a radical change (page 25). We notice constantly in our practice the need to have an impartial arbitrator hearing our family law matters. Most litigants, in family law disputes appreciate the fact that there is a Judge sitting above the dispute, not taking sides, not participating in trial and after hearing all that has been said and done rendering a decision. While our law has traditionally encouraged litigants to settle their own disputes, should they fail, we feel that the traditional approach of our law to the settlement of disputes should remain undisturbed. We strongly feel that the Trial Judge should not enter the forum and participate in the trial which surely must occur if the investigatorial function and the conciliatory function is to be adhered to as suggested.

PART III

Our proposal for a new Family Court structure

While the foregoing may seem harsh criticism of the report and a defence of the present system, we are not per se against change nor against the betterment of our Family law system and the structures which carry out our family law. It is our feeling that the Institute in essence has failed to articulate difficulties of the present system, has failed to convey the pith

and substance of its research to us so that we may compare what is proposed with other systems (surely it has done this?) and also has failed to take note of a startling fact which more than any other should sway conservative legal minds to be in tune with the winds of change, i.e. "the numbers game".

At this stage we feel we must agree with the Institute in looking ahead to new systems to carry on the implementation of family law. We do this now not with any great lack of faith in our present system but rather with the obvious knowledge that perhaps more than anything else the sheer volume of cases in the family law area will swamp the present structures in the foreseeable future. Therefore looking to the future we feel it is advisable that we contemplate a system - perhaps radically different in both philosophy and method than the traditional system - as it may be the only effective and efficient method of retaining equality before the law.

That family break-up is a fact of every day life is beyond doubt. How we handle family problems is or should be a concern to the practicing bar at large. What the working paper in pith and substance is suggesting is a broadening of approach in family law matters to include an investigatorial and conciliatory approach. This may not be as unreasonable as it looks. Given the vagaries of the human condition, our Courts are constantly

being asked by the bar and the litigants to have the wisdom of Solomon and solve complex human problems. In reality lawyers and Courts in dealing with family problems are being asked to answer social economic problems and not true legal problems. It is submitted therefore that the day is past that the legal profession can (a) handle these problems alone and (b) perhaps should ever be asked to handle them alone. Therefore we are agreeable and strongly in favour of the recommendation of the paper that there be some form of supportive services available to the Family Court system. These services should be neither mandatory nor rigidly structured (we have a strong distaste for the "intake process" finding it somewhat dehumanizing). In addition we feel that these services should not be closely allied to the Family Court structure - or any other Court for that matter, but rather should be separate and apart. At present too many social workers attached to the Court structures are perceived to be an adjunct of the Court and we note a strong resentment to this fact. We feel this should not be the case. We feel that these services should be available to support and assist the Court in carrying out its work when and if required by the Court.

Before enunciating our proposal for reform of the Court we would like to make one final remark. It appears to us that the working paper has unduly cluttered its model Court. It strikes us that the Institute is in favour of a one tiered Court

having exclusive jurisdiction in all family law matters. However the force of this recommendation appears to us to be lost somewhat by the fact that the paper goes on to all sorts of permutations and commutations (see pages 49, 50 and 51).

It is our view assuming the need for reform that the Family Court should be enlarged in structure so as to encompass the litigation of all matrimonial problems. The family should be treated wherever possible, legally and socially, as a unit and all problems of the family should be resolved by this one Court, at one time if so requested by the litigant themselves, at minimal costs, with the minimal amount of time spent between the commencement and conclusion.

Our proposal is shared, at best by the majority of people consulted with reservations of varying degree. It is as follows:

- (1) A summary trial much akin to the present Family Court structure
- (2) An appeal procedure by way of trial de novo to the Trial Division of the Supreme Court of Alberta level
- (3) An appeal to the Court of last resort of the province being the Appellant Division of the Supreme Court of Alberta

This Court structure should have greater ancillary social and legal services available to it, which services should include a counselling function. This counselling function may include a

conciliation procedure as well as a reconciliation procedure, but no agreement could be reached on this especially with regard to the conciliation function expressed in the working paper.

It is felt that the trial level should be one of summary procedure. At the moment there is varying procedures in different Courts and this should be changed to one simple set of mechanical procedures to permit people simple, quick and inexpensive access to the Court. However it is felt that there should be an intermediate level of appeal by way of trial de novo with an ultimate appeal to the Court of highest resort in the province. We feel that the trial level should be akin to the existing Family Court, the intermediate appeal level should be to the Supreme Court of Alberta, Trial Division and the last appeal to the Appellant Division. We feel that this proposal would invoke the best elements of the present Court structures and also invoke the expertise garnered by each of these Courts in such a way that it would lead to uniformity of approach.

As we said earlier one of the major criticisms swaying us into consideration of the proposal for a better Court structure is the sheer volume of family law cases in all areas.

For example in 1945 there were 588 divorces in Calgary. This figure dropped slowing to 217 divorces in 1950, stayed relatively constant.....

up to 1955 (189 divorces) with the figure rising slowly to 427 in 1960. The number of divorces increased thereafter to 1,542 in 1970 (these figures are for Decree Nisi). From April 1, 1971 to March 31, 1972 in the Family Court in Calgary there were 1,036 Summons issued of which 616 were served and Court Hearings set. For the 1971 - 72 fiscal year there were 1,694 family cases heard, 2,135 juvenile cases heard and 1,266 neglect cases heard for a total number of cases heard in the Family Court at Calgary for that fiscal year of 5,095 cases. As opposed to this in 1961 the figures were 845 family cases, 479 juvenile cases and 875 neglect cases. Assuming 200 adoption, permanent wardship and affiliation cases heard in the District Court the obvious result is staggering. This leads us to the conclusion that the Court of first instance must be a summary Court with a very simple access procedure. It is felt that the Supreme Court, Trial Division, will shortly not be in a position to handle the volume of cases and if we add on to its present jurisdiction all the cases heard in the Family Court and District Court the system we feel will be to the point where it will be breaking down. However we are concerned that once a summary Court is set up the sheer volume of cases may put expediency as the main criteria for the implication of the family law and therefore we feel that a Trial De Novo Appeal is the best method of appeal in the first instance. Further if the case is of such importance both in the

eyes of the litigants or their Counsel there should be a further right to appeal to the highest Court in the province and we feel the present appeal procedure to that Court should remain unchanged.

All of which is respectively submitted.

Hugh F. Landerkin, Chairman
Family Law Sub-section,
Canadian Bar Association,
Alberta Branch

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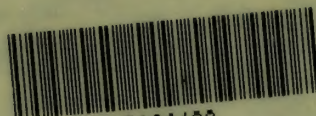
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